Supreme Court, U.S.
FILED
NOV 30 1992
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92-927

No. _____

In The
Supreme Court of the United States
October Term, 1992

United States of America, ex rel.,
The Precision Company,

Petitioner,

v.

Koch Industries, Inc., et. al.,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 25, 1992

QUESTIONS PRESENTED

1. Whether the Tenth Circuit erred in holding that a qui tam action "based upon" an extensive independent investigation of fraudulent activities is barred by Section 3730(e)(4)(A) of the False Claims Act because the action is in any way "supported by" allegations that have been publicly disclosed.

2. Whether the Tenth Circuit erred in holding that a closely held corporation does not qualify as an "original source" under Section 3730(e)(4)(B) of the False Claims Act even though both of its shareholders have "direct and independent knowledge" of the fraudulent activities that form the basis for the qui tam action.

LIST OF PARTIES

Petitioner:

The Precision Company*

Respondents:

Koch Industries, Inc.

Koch Exploration Co.

Koch Pipeline, Inc.

Koch Services, Inc.

Koch Gathering Systems, Inc.

Minnesota Pipe Line Co.

Quanah Pipeline Corp.

Quivera Gas Co.

Koch Oil Co. of Texas, Inc.

Gulf Central Storage & Terminal Co. of Nebraska

Southwest Pipeline Co.

Chaparral Pipeline (NGL) Co.

Gulf Central Pipeline Co.

Kogas, Inc.

*The Precision Company has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI

The United States of America, ex rel. The Precision Company hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Opinions Below

The opinion of the court of appeals is reported at 971 F.2d 548 (10th Cir. 1992). A copy of that opinion, and the court's order denying petitioner's Petition for Rehearing and Motion to Add Parties, are attached to this Petition as Appendix A and Appendix B, respectively. The findings and recommendations of the magistrate judge denying

respondents' Motion to Dismiss, and the memorandum decision of the district court dismissing petitioner's action for lack of subject matter jurisdiction, are attached to this Petition as Appendix C and Appendix D, respectively.

Jurisdiction

The judgment of the court of appeals was entered on July 27, 1992. On August 31, 1992, the court of appeals denied petitioner's timely Petition for Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutory Provisions Involved

Section 3730(e)(4)(A) of the False Claims Act declares that "no court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."

Section 3730(e)(4)(B) of the False Claims Act defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

Statement of the Case

This Petition presents issues that sharply focus on the purpose, intent, and construction of the 1986 Amendments to the False Claims Act. Indeed, the fundamental question presented in this case is whether the lower federal courts are

properly interpreting the jurisdictional provisions of the 1986 Amendments to further the Amendments' congressional purpose of encouraging more private enforcement suits, thereby benefiting the United States Government (the "United States"), for whom qui tam cases are brought. The 1986 Amendments were

> aimed at correcting restrictive interpretations of the act's . . . qui tam jurisdiction and other provisions in order to make the False Claims Act a more effective weapon against Government fraud.

Senate Rep. No. 345, 99th Cong., 2d Sess. 23-24, reprinted in 1986 Code Cong. & Admin. News 5269. The decision below severely undermines this purpose and, as will be shown, the federal courts are in need of guidance from this Court concerning the proper interpretation of 31 U.S.C. § 3730 (e)(4)(A) and (B).

In its Complaint, The Precision Company ("Precision") alleges that Koch Industries, Inc.[1] and its various subsidiaries ("Koch Industries") have defrauded the United States in connection with Koch Industries' purchases of crude oil and natural gas from Federal and Indian lands. Specifically, by knowingly misstating in its favor the amount of crude oil and natural gas that it purchases from Federal

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[1]Koch Industries is a closely held, privately owned corporation with its principal place of business in Wichita, Kansas. Koch Industries' activities include the purchase of crude oil and natural gas from Indian and Federal lands owned and managed by the Bureau of Indian Affairs, Bureau of Land Management, and Minerals Management Service (which acts on behalf of the Bureau of Indian Affairs and Bureau of Land Management in collecting crude oil and natural gas royalty payments for production from Federal and Indian lands). According to Minerals Management Service documents listing Koch Industries' purchases of crude oil and natural gas, Koch Industries purchased $2.5 billion worth of crude oil and $4.9 billion worth of natural gas from Federal and Indian lands from 1983 to 1989.

and Indian lands, Koch Industries has fraudulently and unlawfully sought to decrease the royalty payments it and other entities were obliged to make to the United States for those purchases.[2]

Precision's Complaint is based upon an extensive investigation, begun in 1987, of Koch Industries' fraudulent mismeasurement practices. William I. Koch ("W. I. Koch") initially retained private investigators to conduct the investigation in connection with other litigation then (and still) pending. In January of 1988, he hired William A. Presley ("Presley") to interview oil field experts, investigators, gaugers, and other potential witnesses to verify that Koch Industries indeed had engaged in a pattern of stealing crude oil and natural gas from producers, including the United States. Aplt App, Doc 12, pp. 573-76.

In June of 1988, W. I. Koch and Presley formed Precision to ascertain whether and to what extent royalty payments due to producers and royalty owners could be recovered from purchasers. As part of Precision's formation, W. I. Koch contributed the information he possessed concerning Koch Industries' fraudulent scheme to mismeasure oil and gas. Aplt App, Doc 8, p. 238. Precision continued the investigation, and ultimately determined that the information it had obtained regarding Koch Industries,

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[2]Koch Industries has submitted, and caused others to submit, at least 20,000 false claims to the Minerals Management Service, the agency within the Department of the Interior charged with collecting royalty payments for the Indian Tribes. This obligation arises from the United States' fiduciary duty to account for royalties arising from Indian oil and gas leases, and from the trust relationship between the United States and the Indian people. See Parker v. Richard, 250 U.S. 235, 237 (1919) and Seminole Nation v. United States, 316 U.S. 286, 296 (1942). The Tenth Circuit's decision, based upon a jurisdictional statute that never has been interpreted by this Court, and rendered without any examination of the alleged fraud, may result in the loss of millions of dollars justly due and owing to the United States and the Indian people. Surely that is not what Congress intended when it enacted the False Claims Act and the 1986 Amendments to the Act.

which showed a company-wide scheme of intentional mismeasurement of oil and gas purchased from producers, could be the basis for False Claims Act litigation. Precision thereafter decided to bring a civil action against Koch Industries under the statute. Aplt App, Doc 12, pp. 573-76.

Later that summer, W. I. Koch was contacted by federal agents assigned to a United States Senate investigation ("Senate Investigation") of Koch Industries' fraudulent measuring practices. Precision fully cooperated with the Senate Investigation by making available its non-public documentary evidence of Koch Industries' mismeasurement practices, and by discussing the results of its investigation with the agents. The agents did not disclose to Precision any of the Senate Investigation's results. Precision also met with Senate investigators in October of 1988, and provided all of its information to the Senate, which it continued to do through May of 1989. Aplt App, Doc 12, pp. 577-97.

On May 9, 1989, the United States Senate Select Committee on Indian Affairs (the "Senate Committee") held a public hearing (the "Senate Hearing") on the subject of crude oil thefts from Indian lands. Several witnesses, including persons who previously had provided statements to Precision in connection with its investigation, testified that Koch Industries systematically had stolen crude oil from Indian lands. Information concerning Koch Industries' theft of natural gas was not disclosed at the Senate Hearing. Aplt App, Doc 12, pp. 581-82.

On May 25, 1989, Precision filed its Complaint, under seal, in accordance with the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730(b)(2). The Complaint alleges that Koch Industries has engaged in a consistent pattern of mismeasuring and understating its purchases of crude oil and natural gas from Federal and Indian land sites, and seeks damages and civil penalties on behalf of the United States for false claims arising out of those fraudulent practices.

As required by the False Claims Act, Precision provided a copy of the Complaint and a confidential memorandum to the United States Department of Justice. Aplt App, Doc 1, pp. 1-18; Doc 12, p. 582. The memorandum included 57 exhibits providing evidentiary support for Precision's claims, 56 of which were the product of its investigation. All 56 investigative exhibits had been provided to the Senate Committee. The remaining exhibit, a transcript of the Senate Hearing, was included to demonstrate that the Complaint was not based on the Senate Investigation, but rather on Precision's investigation. Among the 57 exhibits attached to the confidential memorandum were 43 statements from former Koch Industries employees concerning the company's unlawful conduct, all of which were obtained prior to the Senate Hearing.

On June 8, 1989, Koch Industries submitted a statement to the Senate Committee in which it claimed that W. I. Koch was the "source and driving force" behind the Senate Investigation. The statement averred that "[t]he fact that the May 9th hearing was devoted almost exclusively to Koch Industries is a direct result of the efforts of William I. Koch. Having limited resources, the staff obviously embraced the allegations of William I. Koch. They used his witnesses and relied on the statements his investigators delivered to them. . . ." Aplt App, Doc 4, pp. 105-06.

In November of 1989, the Senate Committee issued its Final Report and Legislative Recommendations ("Senate Report"), in which the Committee concluded, inter alia:

> Koch Oil . . . , a subsidiary of Koch Industries and the largest purchaser of Indian oil in the country, is the most dramatic example of an oil company stealing by deliberate mismeasurement and fraudulent reporting. Although Koch is also the largest independent purchaser of crude oil in the United States and Canada and the largest in Oklahoma, the company pilfered additional oil from American Indians and others.

Senate Report at pp. 105-06, Aplt App, Doc 12, pp. 501-02 (footnotes omitted).

On January 23, 1990, after evaluating Precision's investigation and its ability to prosecute the action it had commenced, the United States declined to assume control of this litigation. The United States offered no objection to Precision's continuing the action, however, and specifically reserved the right to intervene at a later time. Aplt App, Doc 27, p. 1383.

On April 16, 1990, Koch Industries filed its Motion to Dismiss alleging that the district court lacked subject matter jurisdiction over Precision's qui tam claims. Specifically, Koch Industries argued that Precision's claims were "based upon" publicly disclosed information, and that Precision had failed to show it was an "original source" of that information. Koch Industries maintained that, absent such a showing, the action was jurisdictionally barred under 31 U.S.C. § 3730(e)(4)(A) and (B). Aplt App, Doc 2, pp. 19-21.

On September 14, 1990, the magistrate judge issued findings and recommendations concluding that because Precision's Complaint was not based upon prior public disclosures of information, it did not need to establish that it was an "original source" of the information disclosed at the Senate Hearing. See Appendix C. The magistrate judge also found that "even if it [Precision] did have to satisfy the [original source] rule, there exists little question that either Plaintiff's President (Presley) or its majority owner (Wm. Koch) were the original sources of . . . the Senate Hearing information (to a large degree)." Id. at 21. The magistrate judge thus concluded that Precision's qui tam action was instituted properly, that the district court had subject matter jurisdiction, and recommended that the Motion to Dismiss be denied.

On November 27, 1990, the district court rejected the magistrate judge's findings and recommendations and granted the Motion to Dismiss. See Appendix D. The district

court held that Precision's Complaint was based, at least in part, upon "publicly disclosed allegations or transactions." Id. at 26. The district court proceeded to conclude that, as a matter of law, a qui tam action based "in any degree" upon publicly disclosed allegations or transactions requires the court to proceed to an "original source" analysis under Section 3730(e)(4)(B), and that to qualify as an "original source" a plaintiff must have provided the United States with "all" of the information upon which the civil action is based. The district court also held that Precision did not qualify as an "original source" under the statute because certain information relied upon by Precision had not been turned over to the United States. Id. at 28-31.

On April 17, 1991, Precision timely filed its Notice of Appeal. Precision argued to the Tenth Circuit that its claims were not "based upon" the public disclosure of allegations or transactions concerning Koch Industries, but, rather, arose from and therefore were "based upon" the evidence it had gathered independently during its extensive investigation. Precision also contended that the district court's conclusion that an action relying "in any degree" upon publicly disclosed allegations or transactions is "based upon public disclosures" was an improper and unduly restrictive interpretation of Section 3730(e)(4)(A). Finally, Precision argued that, contrary to the district court's findings, it had provided the United States with its "information" within the meaning of Section 3730(e)(4)(B), and therefore qualified as an "original source."

On July 27, 1992, the Tenth Circuit affirmed the district court's dismissal of Precision's Complaint for lack of subject matter jurisdiction. See Appendix A. The court of appeals held that an action in any way "supported by" publicly disclosed allegations or transactions is "based upon the public disclosure of allegations or transactions" within the meaning of the False Claims Act, thereby triggering an "exacting" original source analysis under Section 3730(e)(4)(B). Id. at 6-8. Turning to that analysis, the Tenth

Circuit found that despite the exhaustive investigation conducted by W. I. Koch, Presley, and the petitioner, Precision lacked "direct and independent knowledge" of the information upon which its claims were based, and therefore did not qualify as an "original source." Id. at 10-11.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted Because The Tenth Circuit's Interpretation Of 31 U.S.C. § 3730(e)(4)(A), And Its Holding That The Precision Company's Action Is "Based Upon" The Public Disclosure Of Allegations Or Transactions, Conflict With Decisions Of Other Courts Of Appeal And Relate To An Important Unresolved Question Of Federal Law That Should Be Settled By This Court

The False Claims Act authorizes a person to bring a civil action in the name of and on behalf of the United States against a person who has submitted a "false claim" to the Government. 31 U.S.C. § 3730(b). The Act provides, however, that no court shall have jurisdiction over a qui tam action that is "based upon the public disclosure of allegations or transactions" unless the person bringing the action is an "original source." 31 U.S.C. § 3730(e)(4)(A) and (B). This absolute bar has been the subject of a large volume of litigation, and has resulted in conflicting decisions. Certiorari should be granted to resolve the conflict among the circuits concerning the proper interpretation of this important jurisdictional statute.

The First, Third, and Eleventh Circuit Courts of Appeal have interpreted Section 3730(e)(4)(A) according to its plain language and logic. They have indicated that an action is "based upon the public disclosure of allegations or transactions" only if the qui tam plaintiff actually "acquired"

or "derived" his information from public disclosures. U.S. ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 1312 (1991) (Section 3730(e)(4)(A) not a bar if information comprising claim is not "acquired" from public disclosures); U.S. ex rel. Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1159-60 (3d Cir. 1991) (information "received" or "acquired" as a result of a public disclosure is "based upon" that disclosure); U.S. ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1500 n.12 (11th Cir. 1991) (court must determine whether there has been a public disclosure, and if so whether the relator "based" his suit on the disclosure). Under the straightforward reasoning of these courts, an action derived from original information, or from an independent investigation by a qui tam plaintiff, would not be "based upon" any subsequent public disclosure of similar allegations or transactions.

The Tenth Circuit, on the other hand, has joined the Second Circuit to interpret the "based upon" language of Section 3730(e)(4)(A) in a restrictive way, finding that an action in any way "supported by" publicly disclosed allegations or transactions is "based upon" public disclosures within the meaning of the False Claims Act. See Appendix A, at 6-8, and United States ex rel. John Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992) (public disclosure of allegations or transactions divests the district court of jurisdiction regardless of where the qui tam plaintiff obtained his information). This strained reading of the statute bars an action that is derived solely from original information, or from an independent investigation, simply because allegations similar to those uncovered by the qui tam plaintiff are disclosed publicly before the case is filed. This interpretation contravenes congressional intent and subverts

the plain meaning of the statute's self-evident language.[3]

The Tenth Circuit's restrictive interpretation stems, in large part, from its facile conclusion that the words "based upon" properly are understood to mean "supported by." Appendix A, at 6. The court of appeals offered no support for this proposition, other than the conclusory suggestion that it is so "as a matter of common usage." Id. As this Court has noted, however, the starting point for interpreting a statute is its language. Given a statute comprised of "plain words," Congress' intent is determined best by the language it chooses, and absent a clearly expressed legislative intention to the contrary, that language ordinarily should be conclusive. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 n.13 (1985) and Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

The language of Section 3730(e)(4)(A) plainly indicates that "actions" based upon "public disclosures" are barred. This language unmistakably contemplates a connection between the qui tam plaintiff's action and the relevant public disclosure. In other words, an action can be barred by the "based upon public disclosures" language only when that action (or the facts underlying the action) is derived from the disclosure itself, and not from an independent source or investigation. The decision below

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[3]This interpretation is closely akin to the classic logical fallacy rendered in Latin as "post hoc; ergo propter hoc"--the notion that, if B follows A, then B necessarily was caused by A. If Precision's suit followed the disclosure of allegations of a like kind, this argument goes, then it must be assumed to be "based upon," and based only upon, those allegations. That proposition lacks factual as well as logical underpinning, and yields anomalous results. Indeed, qui tam plaintiffs who have assembled the lion's share of the fraud evidence will be barred if any similar evidence, no matter how thin or cumulative, is revealed publicly. It even might enable the potential defendant to frustrate a qui tam action by leaking nominal information. These unintended results certainly will occur if, as the Tenth and Second Circuits have concluded, a civil action that post-dates any public disclosure whatsoever is ipso facto deemed "based upon" that disclosure.

ignores the plain meaning of the statute, however, and asks only whether the action is "supported by" similar allegations or transactions that fortuitously have been publicly disclosed. This test does not examine, as it must, whether the action is "based upon" those similar allegations. The Tenth Circuit's interpretation therefore is contrary to any sensible reading of the statute's plain language.[4]

As the record shows, Precision's action is "based upon" evidence uncovered during its own investigation of Koch Industries. In no meaningful sense is it "based upon" any "public disclosure of allegations or transactions" in a criminal, civil, or administrative hearing, including the Senate Hearing. In fact, the public disclosures at the Senate Hearing have only the slightest resemblance to Precision's comprehensive submission of detailed, sworn statements and affidavits, together with other evidence. See Aplt App, at 255-57 (listing statements and evidence), 600-48 (copies of statements), and Aplt App, at 3-200 (Senate Hearing Transcript). Precision's written statements were not disclosed at the Senate Hearing, although 2 (out of 43) of the

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[4]Cases decided under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), which contains a jurisdictional bar similar to § 3730(e)(4)(A), are illuminating. The FSIA provides, in pertinent part, that a foreign state is not immune from jurisdiction if the plaintiff's action is "based upon" a foreign state's regular course of commercial conduct with the United States. This "based upon" requirement has been construed uniformly to mean that there must be a "connection" or an "identifiable nexus" between the commercial conduct and the action. Gould, Inc. v. Mitsui Mining & Smelting Co., 947 F.2d 218, 221 (6th Cir. 1991), cert. dismissed, ___ U.S. ___, 112 S. Ct. 1657 (1992); Santos v. Compagnie Nationale Air France, 934 F.2d 890, 892 (7th Cir. 1991); Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic, 877 F.2d 574, 582 & n. 10 (7th Cir.), cert. denied, 493 U.S. 937 (1989). See also United States v. Hastings, 296 U.S. 188, 194 (1935) (in a statute limiting jurisdiction to cases in which the district court's decision is "based upon" the invalidity of an underlying criminal statute, the words "based upon" contemplates a nexus or link between the decision and the determination of invalidity).

declarants did testify and 4 exhibits (back gauging reports provided to the Department of Justice) were received into the Senate Hearing record. See Aplt App, at 254. The record clearly demonstrates that the evidence upon which Precision's action was based was not and could not have been drawn from the Senate Hearing because that evidence was not presented in those proceedings. It is more accurate to say that the Senate relied in part on evidence submitted by Precision. Indeed, that was the gravamen of Koch Industries' acrimonious statement to the Senate Committee that the Senate "embraced the allegations of William I. Koch." This admission confirms that Precision's Complaint was not "based upon" any public disclosures from the Senate Hearing.

The Tenth Circuit's decision also resulted from a misconstruction of Section 3730(e)(4)(A) and a misguided focus on whether that provision should be applied only to actions based "solely" upon publicly disclosed information. Appendix A, at 6. The court noted that Congress had chosen not to employ the adverb "solely," and indicated that it was not inclined to read the statute expansively by interpolating that word into it. To do so, the court stated, "would dramatically alter the statute's plain meaning." Id. Precision respectfully submits that the Tenth Circuit turned this interpretation issue on its head.

The issue before the courts below was not whether it was proper to import the word "solely" into the statute, but rather whether it was proper for the court to insert the words "in any degree" or "in any part" between the words "based" and "upon." This interpretation, adopted by both the district court and the court of appeals,[5] is an impermissible reading of Congress' jurisdictional grant, and alters the statute's plain meaning by inserting limiting language that Congress might have used, but did not. Indeed, the words "based upon public disclosures" have been changed to mean "supported in any

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[5]See Statement of the Case, at pp. 7-8.

part" by publicly disclosed allegations or transactions. Under this interpretation, if 99% of the information supporting a qui tam complaint is gathered independently, and only 1% is publicly disclosed material, the complaint is "based upon" public disclosures for purposes of the statute, and is jurisdictionally barred. Such a result clearly is contrary to Congress' intent. Congress made it absolutely clear in 1986 that it intended to lower the barriers to qui tam actions. Senate Rep. No. 345, 99th Cong., 2d Sess. 23-24, reprinted in 1986 U.S. Code Cong. & Admin. News 5288-89.[6]

Precision's investigation began long before any public disclosure occurred in connection with the Senate Investigation, and continued after the Senate Committee reported that Koch Industries was stealing crude oil from Indian lands. (The Senate Report itself was not released until several months after Precision filed its Complaint under seal in the district court.) Since the commencement of Precision's investigation of Koch Industries in October 1987, scores of witnesses with knowledge of Koch Industries' thefts have been located and interviewed. Aplt App, Doc 12, pp. 577-97. Other experts were retained to observe Koch Industries' crude oil and natural gas mismeasurement

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[6]Contrary to the result below, courts have indicated that the bar of § 3730(e)(4)(A) applies only when a complaint is based solely on publicly disclosed information. See Houck on Behalf of U.S. v. Folding Carton Administration Committee, 881 F.2d 494, 504 (7th Cir. 1989), cert. denied, 494 U.S. 1026 (1990). This interpretation is supported (and required) by § 3730(d)(1) of the False Claims Act, which permits a relator who is not the original source of public disclosures to file a complaint based "primarily" on those disclosures, and if the suit is successful, to recover a percentage of the United States' award. This section plainly evidences Congress' intent to allow a relator to commence a qui tam action so long as his complaint is not based solely upon public disclosures. The Tenth Circuit's holding -- that a claim based "in any part" upon publicly disclosed information is barred -- is completely inconsistent with this section, which expressly authorizes compensation to persons commencing an action based primarily on disclosures in congressional hearings or otherwise.

practices. Id. This is the evidence that forms the basis of Precision's action. Public disclosure at the Senate Hearing of allegations of crude oil thefts does not alter the fact that Precision's action is based upon information and knowledge it uncovered in its independent investigation.

Certiorari should be granted to resolve the conflict among the circuits concerning the interpretation of the words "based upon" in Section 3730(e)(4)(A), and to insure that this important federal statute is construed by the lower federal courts to effectuate Congress' clearly expressed intent to expand, not contract, the class of eligible False Claims Act plaintiffs. The unnatural jurisdictional barrier erected by the court below must be removed to enable the statute to accomplish its purpose. Clear guidance from this Court is necessary to prevent further confusion, and to enable litigants and the courts to go about the business of uncovering and rectifying fraud upon the United States and the Indian tribes in the most effective fashion possible.

II. Certiorari Should Be Granted Because The Tenth Circuit's Interpretation Of 31 U.S.C. Section 3730(e)(4)(B), And Its Holding That The Precision Company Does Not Qualify As An "Original Source" Of The Information On Which Its Allegations Are Based, Relate To An Important Unresolved Question Of Federal Law That Should Be Settled By This Court

Even though a court finds that a qui tam action is "based upon the public disclosure of allegations or transactions," Congress has declared that the action still can be heard if the person bringing the action is an "original source." Specifically, the court must determine whether that person has "direct and independent knowledge" of the information on which his allegations are based. 31 U.S.C. § 3730(e)(4)(B). This "original source" requirement has been the subject of important, recurring, and conflicting

litigation. See U.S. ex rel. Stinson v. Prudential Insurance Co., 944 F.2d at 1160-61 (an original source is a close observer of the fraudulent activity or one whose substantive information results from an independent investigation); Houck on Behalf of U.S. v. Folding Carton Administration Committee, 881 F.2d at 504-05 (a relator who would not have obtained information absent a public disclosure does not have direct and independent knowledge, and does not qualify as an original source); U.S. ex rel. LeBlanc v. Raytheon, 913 F.2d at 20 (government employee with contractual responsibility for uncovering fraud lacks independent knowledge and is not an original source); U.S. ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 16-17 (2d Cir. 1990) (in order to qualify as an original source a plaintiff must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which the suit is based); Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992) (all those who directly or indirectly disclose an allegation can qualify as an original source). Certiorari should be granted to provide the lower federal courts with badly needed guidance concerning the proper construction of this important jurisdictional provision.

Having concluded that Precision's action was in part "supported by" and therefore was "based upon" public disclosures, the Tenth Circuit turned to the issue of whether Precision qualified as an "original source" under Section 3730(e)(4)(B). The court reviewed the "classes of information" upon which Precision's claims were based, which it described as follows: (i) information gathered by W. I. Koch; (ii) information gathered by Presley from January of 1988 to June of 1988; and (iii) information gathered by Presley after becoming President of Precision in

June of 1988.[7] Appendix A, at 10-11. The court of appeals then reasoned that because Precision had "made no showing" that it had a "legitimate claim" to the information gathered by W. I. Koch and Presley, it lacked the "direct and independent knowledge" required by Section 3730(e)(4)(B). Id., at 11. *The Tenth Circuit therefore held that the "direct and independent knowledge" of W. I. Koch and Presley, the sole shareholders of Precision, does not constitute "direct and independent knowledge" held by Precision within the meaning of Section 3730(e)(4)(B).*

The Tenth Circuit's interpretation is contrary to the express provisions of the Act, which provide that "[a] person may bring a civil action for violation of [the Act] for the person and for the United States Government," and that no court shall have jurisdiction over a qui tam action based upon the public disclosure of allegations or transactions "unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(b) and (e)(4)(A) (emphasis supplied). It is well-settled that a corporation is a person for False Claims Act purposes. See 1 U.S.C. §1 ("In determining the meaning of any Act of Congress . . . the words 'person' and 'whoever' include corporations, companies, associations . . . as well as individuals."). Thus, the statute expressly authorizes a corporation, such as Precision, to be a relator in a qui tam action.

Moreover, the legislative history of the False Claims Act suggests Congress contemplated that a variety of "original sources" would bring qui tam actions. The 1986 Amendments were passed in part (1) to correct a federal

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[7]It is undisputed that Precision's claims are based upon information gathered by W. I. Koch, Presley on behalf of W. I. Koch, and Precision. Aplt App, Doc 4, pp. 101-04; Aplt App, Doc 8, pp. 237-57; Aplt App, Doc 12, pp. 573-76. It also is undisputed that this information was gathered during the extensive investigation of Koch Industries' fraudulent scheme, and that the investigation led to the formation of Precision in June 1988. Id.

court's refusal to allow the State of Wisconsin to bring a qui tam action even though it was the source of the facts supporting the complaint, and (2) more generally to encourage the commencement of False Claims Act suits on behalf of the United States and to expand the role of qui tam plaintiffs. See U.S. ex rel. State of Wisconsin (Dept. of Health & Social Services) v. Dean, 729 F.2d 1100 (7th Cir. 1984) and Senate Rep. No. 345, 99th Cong., 2d Sess. 23-24, reprinted in 1986 U. S. Code Cong. & Admin. News, at 5269 and 5288-89. The Tenth Circuit's restrictive interpretation of the "original source" requirement impermissibly undermines these stated goals, and ignores the False Claims Act cases in which the qui tam relator was not a natural person. See U.S. ex rel. Woodard v. Country View Care Center, Inc., 797 F.2d 888 (10th Cir. 1986) (State of Colorado found to be a proper relator) and U.S. ex rel. Stinson v. Provident Life & Acc. Ins. Co., 721 F. Supp. 1247, 1258 (S.D. Fla. 1989) (law firm partnership found to be an original source).

Straining for a rationale to support the district court's dismissal (and employing a different rationale than did the lower court),[8] the Tenth Circuit ignored the uncontroverted evidence in the record, which conclusively establishes that Precision is entitled to use the information developed by W. I. Koch and Presley. In his Affidavit of June 6, 1990, Presley testified that W. I. Koch contributed that information

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[8]In reaching its decision, the court of appeals effectively reversed the district court, which had found expressly that Precision had "direct and independent knowledge" of the information upon which its claims are based, as required by § 3730(e)(4)(B). See Appendix D, at 29. Faced with this surprise ruling, Precision filed a Motion to Add Parties with the court of appeals, seeking to add W. I. Koch and Presley as parties plaintiff. Precision argued that the addition of Messrs. Koch and Presley would not prejudice Koch Industries, was authorized by this Court under Mullaney v. Anderson, 342 U.S. 415 (1952), and was in the best interest of the United States. The Tenth Circuit denied that request without explanation. See Appendix B. That ruling conflicts with this Court's decision in Mullaney, was erroneous, and should be corrected by this Court.

to Precision:

> As part of the formation of Precision, and in consideration for his initial 50% stock ownership in Precision, among other things, William I. Koch agreed to contribute all information he possessed concerning Koch's fraudulent scheme to mismeasure crude oil and natural gas. We also agreed to share with each other the results of our future investigative efforts.

Aplt App, Doc 8, p. 238. Precision thus has as much a "claim" to this information as any corporation ever can have.

If the court of appeals' opinion is left standing, many legitimate attempts to punish those who have defrauded the United States will be frustrated because corporate qui tam plaintiffs cannot meet the Tenth Circuit's hypertechnical "direct and independent knowledge" test. Indeed, since no juridical entity ever possesses knowledge apart from the knowledge of the natural persons who act as its agents, officers, directors, and shareholders, courts will be compelled to conclude that no corporation ever can be a qui tam relator. Certiorari should be granted to correct this misconstruction of the False Claims Act, and to insure that the important congressional mandate to expand the class of eligible qui tam plaintiffs is effectuated in this and other cases.

CONCLUSION

For the reasons set out above, Precision respectfully requests that this Court grant certiorari on the issues requested.

Respectfully submitted,

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November 25, 1992

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, ex rel.
THE PRECISION COMPANY,

Plaintiff - Appellant,

v.

KOCH INDUSTRIES, INC.;
KOCH EXPLORATION CO.; KOCH PIPELINE, INC.;
KOCH SERVICES, INC.;
KOCH GATHERING SYSTEMS, INC.;
MINNESOTA PIPE LINE CO.;
QUANAH PIPELINE CORP.; QUIVIRA GAS CO.;
KOCH OIL CO. OF TEXAS, INC.;
GULF CENTRAL STORAGE & TERMINAL CO. OF NEBRASKA;
SOUTHWEST PIPELINE CO.;
CHAPARRAL PIPELINE (NGL) CO.;
GULF CENTRAL PIPELINE CO.;
KOGAS, INC.,

Defendants - Appellees.

No. 91-5062
July 27, 1992

J. David Jorgenson (G. W. Turner III and P. Scott Hathaway with him on the brief) of Conner & Winters, Tulsa,

Oklahoma, for Plaintiff-Appellant.

Robert L. Howard of Foulston & Siefkin, Wichita, Kansas (James M. Armstrong of Foulston & Siefkin, Wichita, Kansas; Clyde A. Muchmore of Crowe & Dunlevy, Oklahoma City, Oklahoma, with him on the brief) for Defendants-Appellees.

Before BALDOCK and BRORBY, Circuit Judges, and BELOT,* District Judge.

BRORBY, Circuit Judge.

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* The Honorable Monti L. Belot, United States District Judge for the District of Kansas, sitting by designation.

Precision Company (Precision) appeals the dismissal of its *qui tam* action for lack of subject matter jurisdiction. Fundamentally, this appeal involves the determination of circumstances under which a *qui tam* plaintiff must demonstrate itself to be an original source under the False Claims Act (FCA), 31 U.S.C. §3729 *et seq.* (1988). Applying the plain language of relevant statutory provisions to the circumstances of this action, we conclude Precision must qualify as an original source. We further conclude Precision has failed to so qualify, and therefore affirm the district court's dismissal.

Overview

Precision filed its complaint to recover, on behalf of the United States, civil penalties and damages from Defendant companies that allegedly filed false claims with the government. The complaint was grounded upon the factual premise that Defendants, by deliberate and systematic mismeasurement, had understated to the United States the quantity of crude oil and natural gas produced from Federal and Indian lands. The complaint was grounded upon the legal premise that Defendants, by the use of under-measurements, had presented false claims to the United States. The alleged false claims represent the difference between the mineral royalties actually reported and those which Defendants should have reported.

Precision commenced this action as a *qui tam* plaintiff pursuant to 31 U.S.C. § 3730(b). Section 3730(b) authorizes a person to bring a civil action in the name of and on behalf of the United States against a person who has submitted a false claim to the Government as defined by 31 U.S.C. §3729(a). However, the statute also provides that no court shall have jurisdiction over a *qui tam* action based upon the public disclosure of allegations or transactions unless the *qui tam* plaintiff is an original source of the publicly disclosed information. *See* 31 U.S.C. §3730(e)(4)(A).

Defendants challenged the trial court's subject matter jurisdiction by producing evidence establishing Precision's complaint was based, at least in part, upon publicly disclosed information. The trial court ruled a *qui tam* plaintiff whose complaint is based in any degree upon publicly disclosed information must demonstrate it was an original source as defined by statute. The trial court then dismissed the *qui tam* action for lack of subject matter jurisdiction, concluding Precision was not an original source.

Precision now appeals asserting: 1) the trial court erroneously construed the applicable statute; 2) the trial court erroneously concluded Precision was not an original source; and 3) the trial court erroneously disregarded affidavits that would have established Precision's status as an original source.

Analysis

The satisfaction of 31 U.S.C. §3730(e)(4) is, as the language indicates, an issue of subject matter jurisdiction. *See United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2nd Cir. 1990); *Houck ex rel. United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 503, 506 & n.9 (7th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990); *United States ex rel. LeBlanc v. Raytheon Co.*, 729 F. Supp. 170, 177 (D. Mass.), *aff'd* 913 F.2d 17 (1st Cir. 1990). We review issues of subject matter jurisdiction de novo.[1] *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 641

[1]Because there is "no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." *Sherman v. American Fed'n of Musicians*, 588 F.2d 1313, 1314 (10th Cir. 1978) (citing *Schramm v. Oakes*, 352 F.2d 143 (10th Cir. 1965)), cert. denied, 444 U.S. 825 (1979). "[T]he trial court may gather evidence on the question of jurisdiction by affidavits or otherwise in an effort to determine the facts as they exist." *Schramm*, 352 F.2d at 149. Factual findings made by the trial court on the question of jurisdiction will not be disturbed unless clearly erroneous. *Sherman*, 588 F.2d at 1314.

(10th Cir. 1990). Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent a showing of proof by the party asserting federal jurisdiction. *Penteco Corp. v. Union Gas System, Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991). Therefore, Precision, the party invoking federal jurisdiction in this case, must "allege in [its] pleading the facts essential to show jurisdiction," and "must support [those facts] by competent proof." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *see also Penteco*, 929 F.2d at 1521.

I. FCA Jurisdictional Requirements

We begin our analysis with an examination of 31 U.S.C. §3730(e)(4), which provides:

> (e) Certain actions barred.--
>
> . . . .
>
> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also FDIC v. Canfield*, ___ F.2d ___, ___, 1992 WL 137888 *1, No. 91-4143 (10th Cir. June 23, 1992). In other words, "[u]nless the statutory language is ambiguous or would lead to absurd results, the plain meaning of the statute must control." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1498 (11th Cir. 1991); *see also Glover Construction Co. v. Andrus*, 591 F.2d 554, 559 (10th Cir. 1979), *aff'd* 446 U.S. 608 (1980).

"Based Upon"

At the threshold, the plain, unambiguous language of §3730(e)(4)(A) states a *qui tam* action may be barred only if the action is "based upon" the public disclosure of "allegations or transactions." Precision would have us read this provision to apply only to actions based "solely" upon publicly disclosed information. We cannot countenance Precision's interpretation.

As a matter of common usage, the phrase "based upon" is properly understood to mean "supported by." In this context, an FCA *qui tam* action even partly based upon publicly disclosed allegations or transactions is nonetheless "based upon" such allegations or transactions. Congress chose not to insert the adverb "solely", and we cannot, because to do so would dramatically alter the statute's plain meaning.

Not only are we governed by the plain language of the statute, we must also be mindful that "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." *F & S Construction Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). To insert the term "solely" into §3730(e)(4)(A) would impermissibly expand federal jurisdiction by allowing *qui*

tam plaintiffs to avoid the more exacting "original source" requirement simply by asserting an additional count. In other words, with a little artful pleading, all *qui tam* plaintiffs could pass the jurisdictional threshold by fashioning complaints only "partly based" upon publicly disclosed allegations or transactions.

A restrictive interpretation of the threshold "based upon" test is also consistent with the dual purpose of this statute. Section 3730--Civil actions for false claims, has two basic goals: 1) to encourage private citizens with first-hand knowledge to expose fraud; and 2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3rd Cir. 1991). Consistent with these purposes, we believe the threshold "based upon" analysis is intended to be a quick trigger for the more exacting original source analysis. Two distinct inquiries are mandated by § 3730(e)(4)(A). Initially, the court must determine whether the action is "based upon the public disclosure of allegations or transactions." If the action is "based upon the public disclosure of allegations or transactions," then the court must determine whether the plaintiff qualifies as an "original source."[2] A fair reading of

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[2]These two inquiries should not be collapsed. The district court was absolutely correct in concluding the "unless" clause of this provision in not implicated until the "based upon" issue is resolved. Precision asserts United States ex rel. LaValley v. First Nat'l Bank of Boston, 707 F. Supp. 1351 (D. Mass. 1988), as authority for the proposition that an independent investigation which renders additional information is sufficient to satisfy the "based upon" test. However, we disagree with the Le Valley court's analysis insofar as it callapsed the two seperate inquiries of §3730(e)(4)(A) and (B). The threshold "based upon" test explicitly refers, in the disjunctive, to publicly disclosed "allegations or transactions." The scope of this threshold test cannot reasonably be interpreted to include "information" derived from subsequent investigation.

this statute in light of its dual purpose leads us to conclude Congress never intended a *qui tam* plaintiff to benefit in whole or in part upon publicly disclosed allegations or transactions *unless* that plaintiff can demonstrate he was an original source as defined by statute.

Finally, a more restrictive interpretation of "based upon" is consistent with practical considerations of judicial economy. It is one thing to expect the court to evaluate the quantity and quality of information in the public domain versus that possessed by the *qui tam* plaintiff after trial for purposes of fee determination;[3] it is quite another to expect a similar evaluation as part of a pre-trial jurisdictional inquiry. This type pretrial inquiry would be onerous, impractical and ultimately would serve neither the interests of the parties nor the court.

For all the foregoing reasons, we conclude that a plaintiff whose *qui tam* action is based in any part upon publicly disclosed allegations or transactions is subject to the "original source" jurisdictional requirement.

"Original Source"

Once it is determined a *qui tam* action is based upon publicly disclosed allegations or transactions, the district court maintains jurisdiction only if "the person bringing the action is an original source of the information." 31 U.S.C. §3730(e)(4)(A). "Original source" is expressly defined as

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[3]Precision asserts §3730(d)(1) supports its interpretation that only actions *solely* based on public disclosures are potentially barred. We disagree. Although §3730(d)(1) allows the court to determine fees in a *qui tam* action partly based on public information, §3730(d)(1) is not a jurisdictional provision. Moreover, its application is limited to those cases in which the government proceeds. The government has elected not to proceed in the present case; therefore §3730(d)(1) is not germane to this analysis.

> [A]n individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. §3730(e)(4)(B).

Two jurisdictional requirements are evident from the plain language of this provision: 1) a *qui tam* plaintiff must have direct and independent knowledge of the information on which the allegations are based; and 2) a *qui tam* plaintiff must have voluntarily provided such information to the government prior to filing suit.[4] These requirements are plain, unambiguous and require no further scrutiny.

II. Precision's Showing

In light of our interpretation of §3730(e)(4), we now evaluate Precision's showing to determine whether the statutory jurisdictional requirements have been satisfied.

"Based Upon"

Allegations that Defendants, by deliberate and systematic mismeasurement, stole crude oil and natural gas from Federal and Indian lands were publicly disclosed on three occasions

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[4]Because we are able to decide this case on the basis of these two explicit requirements, we do not address Defendants' assertion that Precision cannot be an original source because it is not an individual. Nor do we address the merits of a third requirement imposed by the Second Circuit. *See Dick*, 912 F.2d at 16 (additional requirement that a *qui tam* plaintiff must have directly or indirectly been a source to the entity that publicly disclosed the allegations).

prior to Precision filing this *qui tam* action. First, William Koch, Precision's majority shareholder, raised allegations of crude oil theft in three previous lawsuits. These allegations were embodied as RICO counts in civil suits instituted by William Koch in 1981, 1982, and 1985. *See Oxbow Energy, Inc. v. Koch Indus., Inc.*, 686 F. Supp. 278 (D. Kan. 1988); *Koch v. Koch*, 1989 WL 87624, No. 88-1320-K (D. Kan. July 19, 1989), *aff'd* 903 F.2d 1333 (10th Cir. 1990); and *Koch v. Koch Indus., Inc.*, 127 F.R.D. 206 (D. Kan. 1989). Substantial identity exists between the RICO allegations and Precision's FCA allegations. Second, allegations of crude oil and natural gas theft were disclosed during a public hearing of the Senate Select Committee on Indian Affairs. Again, substantial identity exists between the allegations raised before the Senate Committee and Precision's *qui tam* allegations. Finally, the record reveals these same allegations were disclosed in numerous news releases.[5]

The record before us leaves no doubt Precision's complaint is "based upon" publicly disclosed allegations and Precision must therefore qualify as an original source in order to proceed with its claim.

"Original Source"

After carefully evaluating the record to determine whether Precision has shown by competent proof it qualifies as an original source, we conclude it has not. Precision has failed to meet the first jurisdictional requirement under the "original source" definition -- the record is devoid of proof Precision possesses sufficient direct and independent knowledge of information on which its allegations are based.

Precision rests its claim on three classes of information:

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[5]Allegations disclosed via civil litigation, congressional hearings and the news media fall within the scope of public disclosure as contemplated by §3730. 31 U.S.C. §3730(e)(4)(A).

1) information gathered by William Koch; 2) information gathered by William Presley from January 1988 to June 1988; and 3) information gathered by William Presley after becoming president of Precision in July 1988.

Notably, Precision is the *qui tam* plaintiff in the present action, not William Koch or William Presley. Precision did not come into existence as a corporate entity until June 1988. Precision has made no showing it has a legitimate claim to information gathered by Mr. Koch or Mr. Presley prior to its formation. Therefore, Precision cannot seriously argue it qualifies as an original source of the first two classes of information upon which its FCA allegations are based.

With regard to information gathered after Precision was formed -- one affidavit, nineteen unverified statements, four interview summaries, and various "reports" regarding backgauging, tank strapping and gas sales meter runs -- we conclude this information is best characterized as a continuation of, or derived from Mr. Presley's and Mr. Koch's individual investigations. Comparing this third class of information to the first two classes, the information procured by Precision is weak, informal and strikingly redundant. Precision's "independent" information does not convince us it possesses the requisite direct and independent knowledge of the information on which its FCA allegations are based.

Having concluded Precision's FCA complaint is "based upon" publicly disclosed allegations, and having concluded Precision failed to show it qualifies as an original source, we AFFIRM the district court's dismissal of Precision's complaint for lack of subject matter jurisdiction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. THE PRECISION COMPANY, Plaintiff - Appellant,	)
v.	) No. 91-5062
KOCH INDUSTRIES, INC.; KOCH EXPLORATION CO.; KOCH PIPELINE, INC.; KOCH SERVICES, INC.; KOCH GATHERING SYSTEMS, INC.; MINNESOTA PIPE LINE CO.; QUANAH PIPELINE CORP.; QUIVIRA GAS CO.; KOCH OIL CO. OF TEXAS, INC.; GULF CENTRAL STORAGE & TERMINAL CO. OF NEBRASKA; SOUTHWEST PIPELINE CO.; CHAPARRAL PIPELINE (NGL) CO.;GULF CENTRAL PIPELINE CO.; KOGAS, INC., Defendants - Appellees.	)

ORDER
Entered August 31, 1992

Before Baldock, Brorby, Circuit Judges, Belot*, District Judge.

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*The Honorable Monti L. Belot, United States District Judge for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and motion to add parties filed in the

captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision. The motion to add parties is also denied.

Entered for the Court
ROBERT L. HOECKER, Clerk

By: /s/
Patrick Fisher
Chief Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, ex rel. THE PRECISION COMPANY,	)	
Plaintiff,	)	
v.	)	89-C-437-C
KOCH INDUSTRIES, INC., et al.,	)	
Defendants.	)	

FINDINGS AND RECOMMENDATIONS

Now before the Court is Defendants' Motion to Dismiss for lack of subject matter jurisdiction. Plaintiff brings this suit on behalf of the United States under the qui tam provisions of the False Claims Act (31 U.S.C. §§3729-3733). Defendants assert the jurisdictional provisions found at §3730(e)(4)(A) and (B) have not been satisfied. Section 3730(e)(4) states:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the

information.

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

In moving for dismissal, Defendants set forth three principal arguments. First, Defendants assert that the action is based on facts publicly disclosed prior to the filing of Plaintiff's action, and that Plaintiff was not the "original source" of the publicly disclosed information. Second, Defendants assert that Plaintiff can never be an "original source". Third, Defendants contend the action is a subterfuge, brought for purposes of ill will, to harass and annoy them.

The Public Disclosure Element

For either argument to have merit the Court must first find that the Complaint is, in fact, based upon the publicly disclosed information.[1] Should the facts appear otherwise, the "original source" analysis becomes irrelevant. USA, ex rel. LaValley v. First National Bank or Boston, 707 F.Supp. 1351, 1367 (D. Mass. 1988) ("In light of the court's holding that the complaint in this case was not "based upon a public disclosure," this court need not determine whether the relator, LaValley, was an original source of information disclosed

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[1]The "public disclosure" stricture was a response to a Supreme Court decision interpreting the original Act as allowing a qui tam Plaintiff to simply copy his civil complaint from a prior criminal fraud indictment, thus, bringing nothing new to the suit. See, U.S. v. ex rel. Marcus v. Hess, 317 U.S. 537 (1943).

publicly. Section 3730(e)(4)(A) only requires that the relator be an original source of the information in a public disclosure if the court finds that the relator's action was based upon that public disclosure. This action is not, therefore, barred by the jurisdictional bar of the False Claims Act, 31 U.S.C. §3730(e)(4)(A)."

Senate Hearing Disclosures

To this end, Defendants assert that the Complaint is based upon information disclosed at hearings on May 9th and 10th, 1989 before the Special Committee on Investigations, Select Committee on Indian Affairs (U.S. Senate), or news articles reporting on the hearings. (See, *Affidavits of Clyde A. Muchmore*, dated May 30, 1990 and June 5, 1990.) Alternatively, Defendants claim the Complaint is based on information made public in other Koch litigation. (See *Affidavit of Clyde A. Muchmore*, dated May 30, 1990, ¶ 4.) As a result, Defendant asserts that Plaintiff is not the "original source" of the information and is not properly a party-Plaintiff to this action.

Because Defendants, in effect, challenge the jurisdiction of this Court to entertain Plaintiff's action, the United States Magistrate has reviewed each of the various affidavits, transcripts, and other exhibits submitted on this issue. *Western Transportation Company v. Couzans Warehouse & Distributors, Inc.*, 695 F.2d 1033, 1038 (7th 1982) ("We note that the district court may review any evidence submitted on the issue to determine if subject matter jurisdiction exists.")

Upon review of the foregoing materials, the United States Magistrate finds as follows. The "based upon" language of §3730(e)(4)(A) is not defined in the Act; hence, two interpretations of the language are possible in this case, each leading to a different result. One view holds that once a public allegation is made, i.e., that a defendant employed a particular methodology in submitting false claims, any qui tam suit thereafter filed, alleging the same defendant

employed the same methodology, subjects the qui tam plaintiff to "original source" analysis. In this case, applying this interpretation, because it was publicly disclosed that Koch allegedly submitted falsified oil records through a method of mismeasuring, prior to the filing of this suit, Precision would have to be an "original source" of the allegation, or its claims are barred.

The second interpretation requires the Court examine Plaintiff's collection of facts and witnesses at the time of filing the action, and compare them to the underlying facts and witnesses disclosed publicly. The second view requires the Court to look past the public disclosures and, instead, inspect the underlying factual predicates brought by the particular plaintiff. In this case, applying the second view, if Precision's action is based upon facts and witnesses different from the specific facts and witnesses publicly disclosed, Precision need not be an "original source"; i.e., it need not be the originator of the publicly disclosed allegations of wrong-doing. It is sufficient if the claim it now brings is based upon entirely different facts than those earlier made public.

Turning then to the May 9th, 1989 Senate Committee hearing, review of the transcript indicates that (6) individuals testified about Koch's alleged oil mismeasurements. They are Fred Merritt (investigator for a District Attorney's Office), Christopher Tucker (consulting firm), Richard Elroy (FBI), Grey Pyles (oil security specialist), Gene Poteet (contract pumper and former Koch gauger), James Spaulding (contractor and former Koch trucker/gauger), as well as two Indian royalty owners selling to Koch. The newspaper clippings submitted to the Court do not substantially add to the information disclosed in the Senate hearing. If Plaintiff's action is based on information disclosed at the hearing by the above witnesses, then Plaintiff must satisfy the "original source" requirement to vest this Court with jurisdiction.

Upon review of the facts, and in light of §3730(e)(4)(A), the Magistrate finds that Plaintiff's suit (filed May 25th, 1989) is based both upon facts and witnesses discovered

prior to, and following the Senate disclosures. The Magistrate also finds that the action incorporates, to a degree, some of the disclosures made public at the Senate hearings.

Plaintiff's President, William Presley, submits an affidavit which states that the suit is based upon facts obtained during the investigation and interviews of twenty-one (21) Koch employees during the first half of 1988. None of these witnesses testified before the Senate Subcommittee (Plaintiff's Supplemental Memorandum Re: Defendants' Motion to Dismiss, *Affidavit of William A. Presley*, referring to *Exhibit A*.) Presley further states that he interviewed an additional twenty-nine (29) witnesses while investigating this lawsuit. (Id. at *Exhibit B*.) Likewise, none of these witnesses testified before the Senate. After obtaining these witness statements and affidavits, but before filing the instant suit, Presley obtained additional evidence from several of these non-hearing witnesses. (Id. at *Exhibit E*.) The contents of these witness statements, summaries and affidavits are found in the Submission of the Precision Company Regarding Affidavits, Statements, Reports, and Notes of Interviews (2 vols.). The Senate hearings are not, however, the only prior "public disclosures" made of alleged Koch wrongdoing. Preceding both the filing of this action and the Senate hearings are several lawsuits filed by *William I. Koch*, a member of the Koch family and principal shareholder of Plaintiff, "The Precision Company".

Defendants note and argue that the case at bar is "based upon" information publicly disclosed in the case, *Wm. I. Koch v. Koch Industries*, No. 85-1636C (U.S.D.C. D. Kansas). In that Kansas-based action several affidavits were filed on February 23, 1989, some three months prior to the instant action. (See, *Exhibit H, Affidavit of Clyde Muchmore*, filed June 5, 1990; *Exhibit L, Affidavit of Clyde Muchmore*, filed May 31, 1990.) Of twenty (20) statements and affidavits, three are clearly among the statements relied upon by Presley in bringing the instant action: i.e., the *Affidavit of Steven Chin*, March 18, 1988; the *Affidavit of W. Leonard*

Clark, June 4, 1988; and the *Affidavit of W.J. Miller*, July 22, 1988. (See, Plaintiff's Supplemental Memorandum Re: Defendants' Motion to Dismiss, *Exhibit F.*)

Those affidavits set forth the alleged wrongdoings of Koch Industries and were plainly "made public" before the filing of this action.

When considering the effect of these prior public disclosures, the United States Magistrate is keenly aware of the fact that the False Claims Act does not define the term "based upon", as used in §3730(e)(4)(A) (i.e., "No court shall have jurisdiction over an action ... based upon the public disclosure of allegations or transactions ...") Defendants argue that if any part of the action alleges facts which were part of a public disclosure, then the action is "based upon" the public disclosure and the original source requirement must be satisfied. In contrast, Plaintiff's position is that the term "solely" should be read into the statute so that the original source provision is triggered only where the action is "based solely upon" public information. Review of the Act, and of Congress' intent in framing the current statute, reveals the following.

In *Marcus v. Hess*, 317 U.S. 537 (1943) the qui tam Plaintiff filed the suit based solely upon a prior criminal indictment. The *Marcus* decision triggered the first disclosure amendments to the False Claims Act, which have been described as a "jurisdictional bar designed to limit plagiarism on the part of qui tam realtors." *U.S. ex rel. Woodard v. Country View Care*, 797 F.2d 888, 891 (10th Cir. 1986).

Describing the later proposed 1986 amendments to the qui tam provisions, Senator Grassley remarked:

> This amendment seeks to ensure that a qui tam action based solely on public disclosures cannot be brought . . .

132 Cong. Rec. 11,244 (Aug. 11, 1977) (Emphasis added.) See also *U.S. ex rel. Dick v. Long Island Lighting*, 710 F.Supp. 1485 (E.D.N.Y. 1989) (Qui tam action dismissed where Plaintiffs "came into the case on a copied complaint").

The Act itself provides that where the Government takes over the case, qui tam Plaintiffs may share in the rewards, according to what they contributed before Government takeover. A qui tam Plaintiff who "substantially contributed" to the suit is entitled to receive 15 to 20% of the proceeds. Section 3730(d)(1). More importantly, and supportive of Plaintiff's position, is that Plaintiffs who bring suits "based primarily on" prior public disclosures are still entitled to up to 10% of the proceeds won. Id. The implication is that only suits based entirely, or solely, upon public disclosures are jurisdictionally barred. Senator Grassley further remarked,

> This [10%] limitation will affect those persons who have brought a qui tam action based almost entirely on information of which they ... had derived from a public source.

132 Cong. Rec. 11,244 (Aug. 11, 1986) (Emphasis added).

Consequently, it can be reasonably argued that Congress intended to reward Plaintiffs according to the amount of new evidence brought into the suit; greater awards to those bringing much, lesser awards to those bringing little. Only those Plaintiffs with nothing new to offer ("plagiarizers" in the vernacular of Woodard) are jurisdictionally barred. In this light, the Precision Company bears little resemblance to a *Long Island Lighting* or *Marcus v. Hess* type plaintiff, who brought their suits based upon copied complaints. On the contrary, Precision has shown that the instant action is not solely "based upon" public disclosures such that it must

satisfy the original source rule.[2] Much information was

---

[2]Even if it did have to satisfy the rule, there exists little question that either Plaintiff's president (Pressley) or its majority owner (Wm. Koch) were the original sources of both the Senate hearing information (to a large degree) and the Kansas lawsuit information. E.g., U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life and Accident Ins. Co., 721 F.Supp. 1247 (S.D. Fla. 1989) ("Stinson I"); contra, U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co. of America, slip op. No. 90-256 (D.N.J. May 4, 1990) ("Stinson II").

Defendants also argue that a corporation (the plaintiff) can never be an "original source" because an "original source" is defined by the Act to be a an "individual" rather than a "person". See, §3730(e)(4)(B). The Magistrate disagrees. Congress uses the word "person" several times throughout the Act to describe the would-be Plaintiff. See §3730(b)(1) ("A person may bring a civil action"); §3730(b)(5) ("when a person brings an action"); §3730(c)(1), (2), (3), (4), and (5); §3730(d)(1), (2), (3), and (4); §3730(e)(3) and (4)(A); §3730(f). A corporation is a "person". 1 U.S.C. § 1. See also, S. Rep. No. 99-345, 99th Cong. 2d Sess., reprinted in, 6 U.S. Code Cong. and Ad. News 5266, 5273 (1986) ("The term "person" is used in its broad sense to include partnerships, associations, and corporations.") It would make no sense if a corporation were allowed to bring a qui tam action in all cases except where the case is based upon a public disclosure (thus requiring an "individual" to bring suit, under Defendant's view of the original source requirement).

There is nothing in the legislative history of the 1986 amendments to suggest such an intentional dichotomy. The original source requirement springs from a distaste for copy-cat qui tam complaints. The original source concern is not predicated upon an inherent favoritism for breathing individuals as plaintiffs rather than corporate plaintiffs. Indeed, it would be a rare individual with the backbone and legal resources to take on a large government contractor, no matter how great the fraud, or the potential reward. And, the fact that the corporation was founded by Koch and Pressley after they had acquired some of their information is not a bar to Precision's action. While there is little doubt in the Magistrate's mind that Precision was formed for the sole purpose of bringing the instant action, the fact is the information it uses was gathered by its president and principal shareholder. To throw Precision out of court, applying the "original source rule", because its founders and not "it", were the original sources, is nothing less than placing form over substance.

Other courts have had no problem with allowing an artificial

garnered by Wm. Koch and Pressley prior to the February affidavits, and much, following the Senate hearings. Thus, the Magistrate finds, that while there has been prior public disclosure of the issues raised here, this action is not founded on facts set forth only in those disclosures. Other facts have clearly been gathered to substantiate and ground this action. In accord with the expressed purposes of a qui tam action, as reflected by legislative history, Plaintiff may rely in part on public disclosures and still supply facts from its own investigation to support its case; thus obviating the need to satisfy the "original source" requirement.

The Plaintiffs' Underlying Motivation

Finally, Defendants disparage Plaintiff's action, reserving their harshest obloquy for Wm. Koch's apparent motivation of revenge in filing the suit. Defendants describe the action as "one more in a long series of vexatious lawsuits by William I. Koch against Koch Industries and his family." Koch's Reply Brief, at 2. Defendants complain that Wm. Koch "can be characterized as a bounty hunter at best, and at worst, a cynical and vengeful opportunist, misusing the statutes of the United States." Defendants' Response to Precision's Motion to Lift Stay of Discovery, at 3. Defendants assert that Koch's motivation is relevant because they claim suits "motivated by other than the economic reward provided are not welcome under the Act." Koch's

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"person" to be a qui tam plaintiff. E.g., U.S. ex rel. Woodard, 797 F.2d 888 (Plaintiff was State of Colorado); Stinson I 721 F.Supp. 1247 (Plaintiff was professional association); U.S. ex rel. State of Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984 (Plaintiff was State of Wisconsin).

Reply Brief, at 2.[3]

Defendants' postulate is not supported by the history of the Act. To the contrary, it was recognized early on that the qui tam provisions might be used by Plaintiffs' with non-economic motivations. As early as 1885 it was understood that a qui tam plaintiff, acting upon less than honorable motives, would still protect the federal treasury from fraud. The Court in *U.S. v. Griswold*, 24 F. 361, 366 (D. Ore. 1885), observed,

> [The False Claims Act] was passed upon the theory based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.

(Emphasis added) (quoted in *Marcus v. Hess*, 317 U.S. 537, n.5 (1943).) The *Griswold* passage is contained in the legislative history of the 1986 amendments as part of the Senate Report. S. Rep. No. 99-345, 99th Cong. 2nd Sess., reprinted in, 6 U.S. Code Cong. and Ad. News, 5266, 5276 (1986). The amendments do, however, provide for payment of a defendant's attorneys' fees if the suit is both unsuccessful and "clearly vexatious, or brought primarily for purposes of harassment." §3370(d)(4). However, if the suit is meritorious and the U.S. Treasury will benefit, there is no distinction made for suits motivated by pure patriotism and

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[3]In support, Koch highlights the 1989 amendment in §3730(e)(2) in response to "concerns" of increased suits filed to achieve political ends. The argument is specious. Congress' response was to bar suits against certain politically sensitive government employees: congressmen, judges, and senior executive branch officials. Congress does not provide a bar for suits motivated by avarice, animosity or ill will.

suits energized by personal revenge. Plaintiff's final argument, while troubling, i.e., to the extent that the courts become a forum for family feuds or tactical gain, has, in the long run, no merit in light of the ultimate purpose of the Act.

Conclusion

The United States Magistrate finds that the case at bar is not based upon prior public disclosures such that Plaintiff need be an original source in order for this Court to have jurisdiction under 31 U.S.C. §3730(e)(4). To the contrary, the undersigned finds that Plaintiff has brought a proper qui tam action over which this Court has jurisdiction. Therefore, it is the recommendation of the Magistrate that Defendants' Motion to Dismiss be denied.

Pursuant to Local Rule 32(D), parties are given ten (10) days from the above filing date to file any objections with supporting brief.

Dated this 14th day of September, 1990.

JEFFREY S. WOLFE
JEFFREY S. WOLFE
UNITED STATES MAGISTRATE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, ex rel. THE PRECISION COMPANY,	)	
Plaintiff,	)	
vs.	)	No. 89-C-437-C
KOCH INDUSTRIES, INC., et al.,	)	
Defendants.	)	

ORDER

Before the Court is defendants' objection to the Report and Recommendation of the United States Magistrate. The Magistrate recommended that the motion of the defendants to dismiss be denied. This is a qui tam action brought under the False Claims Act, 31 U.S.C. §3729, et seq. (the Act). By statute a qui tam action allows an informer to become a "private attorney general" with a portion of the recovery going to the informer and the remainder to the state. U.S. ex rel LeBlanc v. Raytheon Co., 913 F.2d 17, 19 n.2 (1st Cir. 1990).

The focus of the present motion is §3730(e)(4) of the Act, which provides as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions

> in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office Report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

The Magistrate found, and the parties do not dispute, that the first count of the Complaint is (at least in part) based upon publicly disclosed allegations or transactions. In defendants' words: "Thus, the question is squarely presented -- may a plaintiff maintain a qui tam action without qualifying as the original source if its complaint is based only partly upon public disclosures?" (Defendants' objection at 21).

As the Magistrate noted (Report and Recommendation at 3-4), two interpretations of the "based upon" language are possible. One is to compare the public disclosure to the Complaint's allegations. If the threshold determination is made that the action is "based upon" public disclosures, then the suit is barred unless plaintiff qualifies as an original source. The second interpretation requires the Court to compare the public disclosure to plaintiff's own cache of information. If plaintiff's specific facts and witnesses are different from the specific facts and witnesses publicly disclosed, plaintiff need not be an original source. Defendants argue for the first view, while the plaintiff argues

for the second view.

The Magistrate likewise endorsed the second view, and undertook a detailed analysis of plaintiff's pre-Complaint investigation. His legal conclusion was that "only suits based entirely, or solely, upon public disclosures are jurisdictionally barred" (Report and Recommendation at 7), and that "Plaintiff may rely in part on public disclosures and still supply facts from its own investigation to support its case; thus obviating the need to satisfy the 'original source' requirement." (Id. at 8).

Authority exists which appears to favor the Magistrate's conclusion. In dicta, the Seventh Circuit has stated that "the Act in its present form does not allow a qui tam plaintiff to bring an action based solely on publicly disclosed transactions." Houck on Behalf of U.S. v. Folding Carton Admin., 881 F.2d 494, 504 (7th Cir. 1989). In U.S. ex rel. LaValley v. First Nat. Bank of Boston, 707 F.Supp. 1351 (D.Mass. 1988), the court employed the method of going behind the Complaint's allegations to examine plaintiff's underlying factual inquiry. Id. at 1366-67. Plaintiff herein has also cited passages from the legislative history of the Act, wherein a sponsor of the 1986 amendments stated that the amendments sought to assure that a qui tam action based solely on public disclosure could not be brought by an individual with no direct or independent knowledge of the information. (Plaintiff's Response at 11-12).

The Court must also keep in mind various principles of construction laid down by the Supreme Court. "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Com'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Further, "[g]iven the plain words of the statute," Congress' intent is "best determined by the statutory language that it chooses." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 n.13 (1985).

Engrafting the word "solely" onto the statute does not represent a minor judicial gloss. It dramatically expands federal jurisdiction in this area. Clearly, Congress knew how to draft such language if it wished to do so. See NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522-23 (1984). Statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction. F & S Construction Co. v. Jensen, 337 F.2d 160, 161 (10th Cir. 1964). This Court also takes note of the recent warnings regarding judicial reliance upon unenacted legislative history as opposed to statutory language. See e.g., U.S. v. Taylor, 487 U.S. 326, 344-46 (1988) (Scalia, J., concurring); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring); Wallace v. Christensen, 802 F.2d 1539, 1560 (9th Cir. 1986) (Kozinsky, J., dissenting). Finally, the Court disagrees with the Magistrate's reliance upon §3730(d)(1), which discusses an action "based primarily on" prior public disclosures. By its terms, that section is limited to actions in which the government elects to proceed. §3730(d)(2) addresses situations where the government chooses not to proceed. As a matter of textual interpretation, the Court concludes that a qui tam action based in any degree upon public disclosures requires a court to proceed to "original source" analysis. See U.S. ex rel Dick v. Long Island Lighting Co., 912 F.2d 13, 18 (2nd Cir. 1990) ("[W]e believe that if the information on which a qui tam suit is based is in the public domain, and the qui tam plaintiff was not a source of that information, then the suit is barred.")[1]

As noted, §3730(e)(4)(B) requires an original source to be (1) an individual, (2) with direct and personal knowledge of the information on which the allegations are based and

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[1]The method employed by the court in LeValley, supra, actually collapses the two seperate inquiries of §3730(e)(4)(A) and (B). This is evidenced by the courts's use of "independently," 707 F.Supp. at 1367, a term proper to "original source" analysis under (B). In this Court's view, the "unless" clause of (A) is not implicated until the issue of whether the action is "based upon" public disclosure is resolved.

(3) who has voluntarily provided the information to the government before filing the action. Initially, defendants assert that, as a corporation, plaintiff does not qualify as an "individual" under the statute. The Magistrate pointed to the numerous times that the statute uses the word "person" to describe a qui tam plaintiff, and rejected the conclusion that a corporation is allowed to bring a qui tam action except where the case is based upon a public disclosure. (Report and Recommendation at 8 n.2). The Court agrees. It is notable that Congress altered its terminology as it did. However, interpreting the statute as defendants argue violates the principle that a statute should be interpreted as a whole. See Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); Kokoszka v. Belford, 417 U.S. 642, 650 (1974); Richards v. United States, 369 U.S. 1, 11 (1962).

Second, the plaintiff must have "direct and independent" knowledge of the information. Again, the Court believes this standard is met. The term "direct" does not mean, as defendants appear to argue, that the plaintiff must be able to provide "eyewitness" testimony supporting the allegations. Rather, the requirement is satisfied if the plaintiff gains the information directly through its own interest and efforts and not fortuitously. See U.S. ex rel Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co. of America, 736 F.Supp. 614, 622-23 (D.N.J. 1990). Likewise, the information gained by plaintiff herein through its own investigation was "independent" of the public disclosure. Id. at 623.

The final requirement to qualify as an "original source" is that the plaintiff must have voluntarily provided the information to the government before filing the action. In his May 17, 1990 deposition, plaintiff's president William Presley testified that the information gathered between October of 1988 and May of 1989 had not been provided to the government. In a subsequent affidavit dated June 6, 1990, Presley stated that in fact the information had been provided. Defendants urge the Court to reject the affidavit as "uncorroborated and conclusory." (Defendants' Objection at

40). In the summary judgment context, the Tenth Circuit has made clear that an affidavit conflicting with the affiant's prior sworn statements may be disregarded if it constitutes an attempt to create a sham fact issue. Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986). The court noted that relevant factors included whether the affiant was cross-examined, whether he had access to the pertinent evidence at the time of his earlier testimony, or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain. Id. This Court has found no case applying the Franks principle regarding a motion of this type. However, it is established that "[t]he court, not a jury, must weigh the merits of what is presented on a Rule 12(b)(1) motion. ..." 5A C.Wright & A.Miller, Federal Practice and Procedure, §1350 at 234-35 (1990) (footnotes omitted). Thus, a court may resolve disputed facts in determining the motion. See Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.), cert. denied, 454 U.S. 897 (1981). If Franks applies regarding a summary judgment motion, it necessarily can be applicable regarding a 12(b)(1) motion. The Court believes that the subsequent Presley affidavit should be disregarded, and the Court finds that all of the information upon which the lawsuit is based was not provided to the government as required by the statute.[2] The Magistrate made no finding on this point;

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[2]As defendants note, the affidavit does not indicate that it is based upon personal knowledge and does not state that the information was given to the government before suit was filed. These constitute additional reasons to accord it less weight than an affidavit meeting these standards.

therefore, there is no question that the "clearly erroneous" standard is not implicated. cf. Case v. Mondragon, 887 F.2d 1388, 1392 n.2 (10th Cir. 1989), cert. denied, 110 S.Ct. 1490 (1990).

A party invoking the jurisdiction of the federal courts has the burden of proving that federal jurisdiction does exist. Wegerer v. First Commodity Corp. of Boston, 744 F.2d 719, 727 (10th Cir. 1984). The Court is not persuaded that plaintiff has met its burden.

It is the Order of the Court that the motion of the defendants to dismiss is hereby GRANTED.

IT IS SO ORDERED this 26th day of November, 1990.

H. DALE COOK
H. DALE COOK
Chief Judge, U. S. District Court

Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

No. 92-927

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA, *ex rel.*
THE PRECISION COMPANY,

Petitioner,

vs.

KOCH INDUSTRIES, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly hold that, to establish subject matter jurisdiction under 31 U.S.C. § 3730(e)(4) in a False Claims Act *qui tam* action, petitioner must qualify as an "original source" as defined in 31 U.S.C. § 3730(e)(4)(B), because petitioner's action was based at least in part on prior public disclosures?

2. Did the Court of Appeals correctly hold that petitioner failed to qualify as an "original source" under 31 U.S.C. § 3730(e)(4)(B) because it did not have "direct and independent knowledge" of the information on which the allegations were based?

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UNITED STATES OF AMERICA, *ex rel.*
THE PRECISION COMPANY,

Petitioner,

vs.

KOCH INDUSTRIES, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, The Precision Company, sued respondents, Koch Industries, Inc., and its subsidiaries, under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730, and accused respondents of underreporting the amounts of oil and natural gas they purchased from Federal and Indian lands by deliberate practices of fraudulent measurement. The United States District Court for the Northern District of Oklahoma dismissed the action under 31 U.S.C. § 3730(e)(4) for want of subject matter jurisdiction. The United States Court of Appeals for the Tenth Circuit affirmed the district court's dismissal.

United States ex rel. Precision Co. v. Koch Industries, Inc., 971 F.2d 548 (10th Cir. 1992) (Appendix A to the Petition for Certiorari).

Petitioner's omission of significant facts, and its erroneous reliance on a nonexistent conflict among the circuits, requires a statement of the background to this case and the proceedings below.

I. The Parties and Their Relationships

Respondent Koch Industries, Inc., is a privately-held corporation whose business includes the purchase and transportation of oil and gas; each of the other respondents is a subsidiary or division of Koch Industries, Inc. Nearly all of respondents' oil and gas purchases (including their purchases of oil and gas produced from Federal and Indian lands) are made from the entities who operate the producing properties; those unrelated producers include large integrated companies, such as Exxon, as well as smaller independent producers. Two brothers, Charles Koch and David Koch, are the majority shareholders in Koch Industries, Inc., and are actively involved in the management of the company.

Petitioner, The Precision Company, was incorporated in June 1988 by William Koch, David Koch's twin brother and a former officer, director, and major shareholder in Koch Industries. William Koch was removed from the management of Koch Industries in late 1980 after he failed in an attempt to seize control of the company, and his shares in the company (or shares owned by entities he controlled) were repurchased by Koch Industries in 1983

for 475 million dollars cash. Since selling his interest in Koch Industries, William Koch and entities he controls have filed claims against or involving his brothers and Koch Industries no fewer than seven times, thus far without success.[1] William Koch formed petitioner as a front for further litigation against respondents over allegations he had previously made in other litigation. Although petitioner Precision originally had three stockholders, at the time the instant action was filed its stockholders were William Koch, who owned 75% of petitioner's stock, and William Presley, who owned the remaining 25% and was petitioner's President.

II. The Prior Public Disclosures About Respondents' Alleged Mismeasurement Practices

Before this action was filed on May 25, 1989, charges that respondents were allegedly engaged in fraudulent

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[1] The six cases besides the present one are *Koch v. Koch Industries, Inc.*, No. 85-1636-C (D. Kan.), *mandamus denied*, No. 87-1689 (10th Cir., June 24, 1987), later opinion 127 F.R.D. 206 (D. Kan. 1989) (still pending in U. S. District Court); *Oxbow Energy, Inc. v. Koch Industries, Inc.*, 686 F. Supp. 278 (D. Kan. 1988) (dismissing case), *aff'd*, No. 88-2300 (10th Cir., Jan. 5, 1990); *Koch v. Koch*, No. 88-1320-K (D. Kan. Nov. 4, 1990), *aff'd*, 903 F.2d 1333 (10th Cir. 1990); *Koch v. Koch*, No. 88-C-1782 (Kan. 18th Dist. Ct., decided May 30, 1989), *aff'd mem.*, 791 P.2d 753 (Kan. App. 1990); *In re Estate of Koch*, No. 90-P-1491 (Kan. 18th Dist. Ct., decided Dec. 31, 1991) (appeal pending before the Kansas Court of Appeals), and *U.S. ex rel. Precision Co. v. Koch Industries, Inc.*, No. 91-C-763-B (N.D. Okla., filed Sept. 30, 1991, dismissed for lack of subject matter jurisdiction Dec. 11, 1992, notice of appeal filed Jan. 8, 1993). This last case is another False Claims *qui tam* action in which petitioner and its shareholders have unsuccessfully attempted to "cure" the jurisdictional defects in the present lawsuit.

mismeasurement of oil and gas produced from Federal and Indian lands were raised in public hearings conducted by a Committee of the United States Senate on May 9, 1989. During the Senate hearings, both documentary and testimonial information relating to the allegations was disclosed. Some of that information was assembled in earlier investigations conducted by William Koch and William Presley, and some was obtained by the Committee from other sources, including a subpoena directed to Koch Industries. The allegations from the Senate Committee hearing received widespread publicity in the news media.[2]

Completely unmentioned in the Petition for Certiorari is the fact that virtually identical public allegations of wrongdoing had surfaced earlier, before petitioner had even come into existence. *See* 971 F.2d at 553-54. Those earlier allegations were raised by William Koch and entities he controls, well before the present case was filed, in *three* lawsuits filed in the United States District Court for the District of Kansas.[3]

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[2] Later news media reports of the allegations occurred when the Bureau of Land Management and the Osage Tribal Council announced that their investigations had found no support for the allegations made in the Senate Committee hearings, and when the United States Attorney in Oklahoma City announced that a federal grand jury investigation into respondents' alleged mismeasurement had been terminated with no indictments expected.

[3] Those allegations *first* appeared in Amendments to the Complaint in *Oxbow Energy, Inc. v. Koch Industries, Inc.*, No. 87-2436-S, filed Aug. 26, 1987, dismissed 686 F. Supp. 278 (D. Kan. 1988), *aff'd* No. 88-2300 (10th Cir. Jan. 5, 1990), and are virtually word-for-word identical to those pleaded in this case: the only

III. The Proceedings Below

Petitioner filed the complaint in this action, under seal, on May 25, 1989, but the complaint was only unsealed and served on respondents on March 5, 1990, after the United States, having conducted its own extensive investigation of the allegations, declined to intervene. Respondents moved to dismiss the complaint for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A) because

> (1) the action was based upon allegations of wrongdoing that had already been disclosed in Congressional hearings, in the news media, and in three prior lawsuits, and was therefore barred unless petitioner could qualify as an "original source" as defined in 31 U.S.C. § 3730(e)(4)(B); and
>
> (2) petitioner could not qualify as an "original source" since
>
> > (a) petitioner was a corporation, rather than an individual, as the statute requires;
> >
> > (b) petitioner had withheld much of its information about respondents' alleged wrongdoing, instead of providing that

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significant difference is that the earlier allegations are not limited to oil and gas purchased from Federal and Indian lands. The same allegations were repeated by William Koch in pleadings filed July 29, 1988 in a *second* lawsuit, *Koch v. Koch*, No. 88-1320-K (D. Kan., filed June 17, 1988), but rejected by the district court (Nov. 4, 1988), *aff'd* 903 F.2d 1333 (10th Cir. 1990), and then raised yet a third time in a proposed Second Amended Complaint, filed in November 1988, that was disallowed as untimely and in bad faith in *a third* lawsuit, *Koch v. Koch Industries*, 127 F.R.D. 206 (D. Kan. 1989).

> information to the government before suit, as the statute requires; and
>
> (c) petitioner's information about respondents' alleged wrongdoing was not "direct and independent" as the statute requires, because petitioner, as a corporation,
>
> > (i) could act only through human intermediaries and was therefore inherently capable only of indirect and derivative knowledge, and
> >
> > (ii) because petitioner's information was compiled before petitioner's incorporation through lengthy chains of hearsay and multiple intermediaries.

In advisory findings and recommendations, the United States Magistrate, Jeffrey Wolfe, found as a fact that petitioner's lawsuit was based *both* upon nonpublic information acquired by petitioner, *and* on information made public in the Senate Committee hearings and in the course of William Koch's prior lawsuits against respondents:

> [T]he Magistrate finds that Plaintiff's suit (filed May 25th, 1989) is based both upon facts and witnesses discovered prior to, and following the Senate disclosures. The Magistrate also finds that the action incorporates, to a degree, some of the disclosures made public at the Senate hearings.

Appendix C to the Petition for Certiorari, at A-18 to -19. The Magistrate then incorrectly interpreted the jurisdictional bar of § 3730(e)(4), which divests courts of jurisdiction over lawsuits "based upon" such public disclosures unless the relator qualifies as an "original source," as

applying only to lawsuits based *solely* upon the public disclosure; reasoning that "[Petitioner] may rely in part on public disclosures and still supply facts from its own investigation to support its case," the Magistrate recommended that petitioner's lawsuit not be dismissed. *See* Appendix C to the Petition for Certiorari, at A-22.

On review of the Magistrate's recommendation, Judge H. Dale Cook (N.D. Okla.) specifically found that the key factual element in the record was undisputed:

> The Magistrate found, and the parties do not dispute, that the first count of the Complaint is (at least in part) based upon publicly disclosed allegations or transactions. In [respondents'] words: "Thus, the question is squarely presented – may a plaintiff maintain a qui tam action if it is based only *partly* on public disclosures?

Appendix D to the Petition for Certiorari, at A-26 (emphasis in original).

Judge Cook correctly concluded that section 3730(e)(4)(A) does not apply only to lawsuits based "solely" on public disclosures:

> Engrafting the word "solely" onto the statute does not represent a minor judicial gloss. It dramatically expands federal jurisdiction in this area. Clearly, Congress knew how to draft such language if it wished to do so. . . . Statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction. . . . As a matter of textual interpretation, the Court concludes that a *qui tam* action based in any degree on public

> disclosures requires a court to proceed to "original source" analysis.

Id. at A-28.

Judge Cook further held that petitioner did not qualify as an original source and specifically found that petitioner had not provided the government with all its information about respondents' alleged wrongdoing before filing suit. *Id.* at A-29 to -31. Judge Cook accordingly dismissed the action for want of subject matter jurisdiction.

Petitioner then sought review in the Court of Appeals for the Tenth Circuit. On appeal, petitioner reasserted its view that § 3730(e)(4) applied only to actions based "solely" upon public disclosures, while respondents relied on Judge Cook's interpretation that the jurisdictional bar applies to actions "based in any degree upon public disclosures." In a published opinion filed July 27, 1992, 971 F.2d 548, a unanimous panel of the Court of Appeals for the Tenth Circuit affirmed Judge Cook's order of dismissal, holding that "a plaintiff whose *qui tam* action is based in any part upon publicly disclosed allegations or transactions is subject to the 'original source' jurisdictional requirement" *id.* at 553, and that because "[t]he record before us leaves no doubt [petitioner's] complaint is 'based upon' publicly disclosed allegations . . . [petitioner] must therefore qualify as an original source in order to proceed with its claim." *Id.* at 554.

The Court of Appeals also held that petitioner could not qualify as an "original source" under section

3730(e)(4)(B). The Court's review of the record demonstrated that with unimportant exceptions, described as "weak, informal, and strikingly redundant," 971 F.2d at 554, all of the information on which petitioner's allegations against respondents are based was gathered by others *before* petitioner came into existence, and that petitioner "cannot seriously argue it qualifies as an original source" of the information whose compilation (and at least partial public disclosure) predated petitioner's existence. The Court therefore affirmed the district court's dismissal of petitioner's action for want of subject matter jurisdiction.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Petitioner's Current Argument That This Action Is Not "Based Upon" Public Disclosures is Contrary To The Uncontested Factual Findings Of The District Court And Distorts The Holding Of The Court Of Appeals

The district court and the Court of Appeals both recognized that petitioner did not dispute that its action was at least partly "based upon" public disclosures within the meaning of 31 U.S.C. § 3730(e)(4)(A), and that the jurisdictional question turned on whether "based upon" means "based *solely* upon," as argued by petitioner. The Court of Appeals squarely rejected petitioner's interpretation as incompatible with ordinary usage of the express statutory terms:

> At the threshold, the plain unambiguous language of § 3730(e)(4)(A) states a *qui tam*

> action may be barred only if the action is "based upon" the public disclosure of "allegations or transactions." [Petitioner] would have us read this provision to apply only to actions based "solely" upon publicly disclosed information. We cannot countenance [Petitioner's] interpretation.
>
> As a matter of common usage, the phrase "based upon" is properly understood to mean "supported by." In this context, an FCA *qui tam* action even partly based upon publicly disclosed allegations or transactions is nonetheless "based upon" such allegations or transactions. Congress chose not to insert the adverb "solely," and we cannot, because to do so would dramatically alter the statute's plain meaning.

971 F.2d at 552. The Court of Appeals likewise concluded that respondents' "restrictive interpretation" was more consistent with the principle that jurisdictional statutes are to be strictly construed, reasoning that under petitioner's interpretation "with a little artful pleading, all *qui tam* plaintiffs could pass the jurisdictional threshold by fashioning complaints only 'partly based' upon publicly disclosed allegations or transactions." *Id.* And the Court of Appeals further reasoned that in light of the purpose of § 3730(e)(4) "Congress never intended a *qui tam* plaintiff to benefit in whole or in part upon publicly disclosed allegations or transactions *unless* that plaintiff can demonstrate he was an original source as defined by statute." *Id.* at 552-53 (emphasis in original).

In its Petition for Certiorari, however, petitioner seeks to distort the decision of the Tenth Circuit in order to create the false impression of a conflict among the

circuits. Seizing upon the single sentence that equates "based upon" with the words "supported by," petitioner argues that the Court of Appeals' "strained reading" of the statute would bar "an action that is derived solely from original information . . . simply because allegations similar to those uncovered by the *qui tam* plaintiff are disclosed publicly before the case is filed." Petition for Certiorari at 10. But the Court of Appeals simply did *not* rule that some causal connection between the public disclosures and the *qui tam* action was unnecessary.[4] Instead, the Court of Appeals' opinion analyzes the single issue of whether the statutory "original source" requirement can be avoided if the *qui tam* action is only partly based upon the public disclosure. The existence of a causal connection is an implicit premise of that analysis: the analysis would have been unnecessary had the Court of Appeals intended to rule that any public disclosure at all triggered the "original source" requirement. Indeed, the Tenth Circuit's recognition of a causal connection between the public disclosures and the *qui tam* allegations is explicit in its conclusion that "Congress never intended a *qui tam* plaintiff *to benefit in whole or in part* upon publicly disclosed allegations or transactions *unless* that plaintiff can demonstrate he was an original source as defined by statute." 971 F.2d at 553 (emphasis added).[5]

---

[4] The Court of Appeals was obviously correct in observing that an action "based upon" a public disclosure can also be said to be "supported by" that public disclosure. This, however, is a far cry from saying that there need not be any causal connection between the action and the public disclosure.

[5] Although the Tenth Circuit did *not* give the statute the restrictive interpretation adopted in *United States ex rel. John Doe*

Moreover, there was no reason for the Tenth Circuit to decide whether the statute requires a causal connection between the public disclosures and the *qui tam* action, because the findings of fact in this case, which were undisputed by petitioner, clearly establish such a causal connection. Thus the Magistrate, although accepting petitioner's argument that the statutory phrase "based upon" means "based solely upon," nonetheless expressly found that petitioner's action was in part based on "some of the disclosures made public at the Senate hearings," as well as on evidentiary affidavits publicly disclosed in a prior William Koch lawsuit against respondents.[6] Appendix C at A-18. On review, the district court found, without contradiction from petitioner, that "the parties do not dispute . . . that [Petitioner's action] is (at least in part) based upon publicly disclosed allegations or transactions." These factual findings went uncontested in the

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v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992), such an interpretation does *not* bar all actions "derived solely from original information, or from an independent investigation," as petitioner argues, Petition for Certiorari at 10, but merely requires the relator to qualify as a statutory "original source." *See Doe*, 960 F.2d at 322 n.3.

[6] Significantly, until the Senate Committee Hearing, petitioner had no information concerning measurement of production from Federal or Indian lands, and had no access to respondents' internal "over and short" statistics, which were subpoenaed by the Committee. See Applee. Supp. App. at 92-168; Brief of Appellees at 17 & n.10. Petitioner had counsel present at the Committee Hearing, and filed its *qui tam* suit within two weeks of the hearing; petitioner also included a transcript of the hearing in its submission to the government of information on which its suit was ostensibly based. *See* Petition for Certiorari at 6.

Court of Appeals, where petitioner again argued that only a lawsuit based "solely" on public disclosures was subject to section 3730(e)(4)'s jurisdictional bar:

> [Respondents] challenged the trial court's subject matter jurisdiction by producing *evidence* establishing [petitioner's] complaint was based, at least in part, upon publicly disclosed information. The trial court ruled a *qui tam* plaintiff whose complaint is based in any degree upon publicly disclosed information must demonstrate it was an original source as defined by statute.

971 F.2d at 551 (emphasis added).

Thus while petitioner now would have this Court believe that the record shows that petitioner's lawsuit was "[i]n no meaningful sense" based upon public disclosures, Petition for Certiorari at 12, and that there is no causal connection between petitioner's lawsuits and the prior public disclosures, *id.* at 11 & n.3, those propositions have been found to be untrue. Petitioner is actually asking this Court to evaluate an argument unmentioned in the Court of Appeals' decision, and to revisit district court factual findings that went entirely uncontested below.

II. The Supposed Conflict Among the Courts of Appeals Does Not Exist

Petitioner asserts that the Tenth Circuit's holding that this lawsuit was "based upon" prior public disclosures within the meaning of 31 U.S.C. § 3730(e)(4)(A) is in conflict with decisions of three other Courts of Appeals:

United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 1312 (1991); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1159-60 (3d Cir. 1991); and *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500 n.12 (11th Cir. 1991). In truth, however, *none* of those three opinions conflicts with the Tenth Circuit's holding.[7]

Williams was a False Claims Act *qui tam* lawsuit brought by an attorney who became aware of bid-rigging on government contracts in the course of his employment by the government. The district court granted *the government's* motion to dismiss the claim for lack of subject matter jurisdiction. On appeal to the Eleventh Circuit, the central issue was the government's assertion that *no* government employee could qualify as a *qui tam* relator with respect to information acquired in the course of his employment. The government's novel theory was that a "public disclosure" occurs any time a government employee acquires information in his official capacity, and then "reveals" that information to himself in his private capacity. 931 F.2d at 1499.

---

[7] Petitioner never cited *any* of these three cases to the Court of Appeals as support for petitioner's arguments that a False Claims Act *qui tam* action is not "based upon" public disclosure if the relator has at least some information that has not been publicly disclosed. *See* Opening Brief of Appellant; Response Brief of Appellant; Petition for Rehearing. Indeed, in a supplemental letter filed pursuant to Fed. R. App. Proc. 28(j), *respondents* brought the Third Circuit's *Stinson* opinion to the Tenth Circuit's attention as supporting their position (petitioner filed no Rule 28(j) letter).

The Eleventh Circuit Court of Appeals rejected the "dubious logic" of the government's dual status argument, and held that there had been no "public disclosure" within the meaning of section 3730(e)(4)(A). *Id.* at 1499-1500. Having found no public disclosure within the meaning of the statute, the Eleventh Circuit found it unnecessary to decide what the statute means when it refers to an action "based upon" public disclosure, or decide whether the relator could qualify as an "original source" under the statute.

LeBlanc was likewise a *qui tam* False Claims Act case brought by a government employee over fraud that he uncovered in the course of his employment. As in *Williams*, the *government* contested the existence of subject matter jurisdiction under the same "public disclosure" theory advanced in *Williams*, and the district court accepted the government's theory and dismissed the case. The Court of Appeals for the First Circuit rejected the district court's adoption of the government's "dual status" argument, however, and criticized the argument as requiring "the assumption that government employees lead schizophrenic lives, and can publicly disclose information to themselves." 913 F.2d at 20. As in *Williams*, the *LeBlanc* opinion rejects the government's "intrapsychic" theory of "public disclosure," and does not reach the statutory "based upon" language.

Stinson, the third purported "circuit conflict" case cited by petitioner, also focuses on whether particular events constituted "public disclosure" under 31 U.S.C. § 3730(e)(4)(A). The *Stinson* relator had obtained through discovery in an ordinary civil lawsuit information which suggested that the Prudential Insurance Company (not a

party to that lawsuit) had defrauded the government, and therefore filed a False Claims Act *qui tam* lawsuit against Prudential. The district court granted the defendant's motion to dismiss for lack of subject matter jurisdiction, 736 F. Supp. 614 (D.N.J. 1990), and the Third Circuit Court of Appeals affirmed, 944 F.2d 1149 (1991).

The Third Circuit's *Stinson* opinion analyzes whether discovery proceedings in civil litigation constitute a "civil hearing" within the meaning of section 3730(e)(4)(A), 944 F.2d at 1154-57, and whether the critical information was "publicly disclosed" when it was produced in discovery, *id.* at 1157-60. Answering both questions in the affirmative, the court then addresses whether the relator could qualify as an "original source" and concludes it could not, since the relator's knowledge of the alleged wrongdoing was neither "independent" of the public disclosure (the discovery disclosure was concededly the source of the relator's substantive knowledge) nor "direct" (it came through two intermediaries). *Id.* at 1160-61. The *Stinson* court's *entire* discussion of the meaning of the statutory requirement that a jurisdictionally barred action be "based upon" publicly disclosed information is contained in a fragment of a footnoted sentence: "[I]t is plain that [the relator's] *qui tam* action is 'based upon' the allegations or transactions publicly disclosed in a civil hearing." 944 F.2d at 1160 n.9. Indeed, the *Stinson* opinion expressly declines to consider "whether a public disclosure bars a *qui tam* suit by someone who acquires the information independently from the public disclosure, but who does not fit within the stringent definition of an original source." *Id.*

Thus the three decisions on which petitioner relies do not decide the meaning of the phrase "based upon," nor even discuss it in dicta. The purported "Circuit Conflict" that petitioner cites does not exist. Indeed, the *only* Court of Appeals' opinion yet to decide whether an action is "based upon" public disclosure, even if the relator acquired no information from that disclosure, is *United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). *Doe* was a lawsuit brought by a criminal lawyer who learned of the alleged fraud against the government in the course of his representing one of the fraudfeasors, who later was granted immunity and testified in public criminal proceedings brought against others. The relator argued that his *qui tam* lawsuit was not "based upon" the public disclosures during the criminal proceedings, because he had learned about the fraud during his prior representation of the immunized fraudfeasor. The *Doe* court rejected the argument:

> The relator's argument misses the point. The allegations in his [*qui tam*] complaint are the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit. Public disclosure of the allegations divests district courts of jurisdiction over *qui tam* lawsuits regardless of where the relator obtained his information. *See [United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990)] ("[I]f the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff is not a source of that information, then the suit is barred."); *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1367 (D. Mass. 1988) (*qui tam* suit not barred because information in complaint was not

"information that was contained in *any* public disclosure") (emphasis added).

960 F.2d at 324.[8]

III. The Court of Appeals Correctly Held That Under Section 3730(e)(4)(B), Petitioner Cannot Qualify As An "Original Source"

The Court of Appeals' decision that petitioner could not qualify under 31 U.S.C. § 3730(e)(4)(B) as the "original source" of information about respondents' alleged wrongdoing was premised on the fact that essentially all that information had been gathered (and in part publicly disclosed) *before petitioner was formed as a corporation*. This unique factual predicate to the Tenth Circuit opinion has not occurred in any prior False Claims Act case, is unlikely to recur, is obviously correct, and surely is not an issue on which the lower federal courts are in need of guidance.

Nor is it the case that under the ruling below no corporation will ever be able to qualify as a *qui tam* relator, as petitioner argues. In the first place, the "original source" requirement only comes into play where there has been a public disclosure, in which event Congress has mandated that the plaintiff be an individual with direct and independent knowledge. No such requirements exist for any other False Claims Act *qui tam* action. In the

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[8] Dicta in Judge Scirica's dissenting opinion in *Stinson, supra*, arrives at the same conclusion as does *Doe*, 944 F.2d at 1168 n.1, but the *Stinson* majority found it unnecessary to reach the issue and expressly declined to do so, *id.* at 1160 n.9.

second place, when the "original source" requirement is at issue, the Court of Appeals' decision neither states nor implies that human beings cannot convey information about wrongdoing to a corporation, or that corporations cannot be False Claims Act relators, but merely holds that petitioner cannot fairly make a claim to *original source status* with respect to information that predates petitioner's existence. Thus, under the Tenth Circuit's rationale, corporate status is no obstacle in the many cases in which there has been no pre-suit public disclosure as defined in section 3730(e)(4)(A). And although respondents did argue below that a corporation could not qualify as an "original source" under section 3730(e)(4)(B), since that statutory provision explicitly defines an "original source" as "an individual," and since corporations, which only function through human intermediaries, are inherently incapable of the "direct" knowledge that the statute also requires, the Court of Appeals explicitly declined to address these arguments. 971 F.2d at 553 n.4.

CONCLUSION

Petitioner's current jurisdictional theories were not ruled upon by the Court of Appeals, are in direct conflict with the district court's uncontested findings of fact, and have been rejected by the only appellate decision on point. Petitioner's contention that its arguments are supported by decisions in three other circuits, which are said to "conflict" with the Tenth Circuit's supposed interpretation, is simply incorrect: the three "conflicting" cases do not even discuss, much less decide, the issue that petitioner now raises.

Petitioner's argument that the Court of Appeals erred in holding that petitioner was not an "original source" of the information on which its lawsuit was based, and its assertion that this ruling must be revisited to give the lower courts guidance on the proper interpretation of the statutory "original source" provisions, also misconstrues the decision below. The Tenth Circuit's decision that petitioner could not be an "original source" of information gathered by others before petitioner was formed is obviously correct (petitioner does not even argue that there is a conflicting case on point), and is based on unique facts unlikely to recur.

Petitioner has wholly failed to justify its assertion that this Court should review the decision below: the Petition for Certiorari should be denied.

Respectfully submitted,

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MOTION FILED
JAN 26 1993

No. 92-927

In The
Supreme Court of the United States

October Term, 1992

United States of America, ex rel.,
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Respondents.

Council of Energy Resource Tribes
and the Osage Tribe of Oklahoma
Motion for Leave to File
Brief *Amicus Curiae*
in Support of The Precision Company's
Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit
and Brief *Amicus Curiae*

MOTION FOR LEAVE TO FILE BRIEF
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Motion for Leave to File Brief *Amicus Curiae*

The Council of Energy Resource Tribes and the Osage Tribe of Oklahoma hereby respectfully move for leave to file the attached Brief *Amicus Curiae* in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondents was requested but refused.

Amici Curiae, who represent fifty-four federally recognized Indian tribes, have a substantial stake in the outcome of this False Claims Act case. Successful prosecution of Petitioner's claim will result in a significant direct recovery for those Indian tribes and their members. In addition, the False Claims Act, properly interpreted, represents a valuable tool in the limited arsenal available to Indian tribes to protect their natural resources and the federal appropriations that are made available to the tribes and their members. A common sense interpretation of the jurisdictional provisions of the False Claims Act by this Court will thus have an additional broad general impact upon the interests of *Amici Curiae*.

The Tenth Circuit's decision below is, as Petitioner

has argued, contrary to better reasoned decisions of other federal circuits, and is contrary to applicable doctrines of statutory interpretation. However, Petitioner has failed to address several issues important to a full and complete analysis of this case. The Petition does not mention the Tenth Circuit's error in invoking inapposite considerations of federalism in a case involving fraud against the United States, does not adequately address and protect the specific claims of Indian tribes and individuals whose rights are being asserted by the Complaint, and does not raise certain important public policy considerations arising from the decision below. *Amici Curiae* believe that the Brief which they intend to file will be helpful to the Court in analyzing these issues.

The Council of Energy Resource Tribes and the Osage Tribe of Oklahoma therefore respectfully request, pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, that this Court grant them leave to file the attached Brief *Amicus Curiae*.

Respectfully submitted,

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BRIEF *AMICUS CURIAE*

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January 26, 1992

QUESTIONS PRESENTED

1. Whether the Tenth Circuit erred in holding that a *qui tam* action "based upon" an extensive independent investigation of fraudulent activities is barred by Section 3730(e)(4)(A) of the False Claims Act because the action is in any way "supported by" allegations that have been publicly disclosed.

2. Whether the Tenth Circuit erred in holding that a closely held corporation does not qualify as an "original source" under Section 3730(e)(4)(B) of the False Claims Act even though both of its shareholders have "direct and independent knowledge" of the fraudulent activities that form the basis for the *qui tam* action.

3. Whether the Tenth Circuit employed an inappropriate analytic framework for interpreting the jurisdictional provisions of the False Claims Act Amendments of 1986, and failed to consider properly the claims of Indian tribes and individuals represented by the Complaint below.

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INTEREST OF *AMICI CURIAE*

Amici Curiae Council of Energy Resource Tribes ("CERT") and the Osage Tribe of Oklahoma represent a number of real parties in interest to this litigation.[1] The Council, founded in 1976, is a membership organization presently composed of fifty-three federally recognized Indian tribes, including oil and gas producing tribes located from Montana to Oklahoma and from North Dakota to Arizona, covering some of the nation's most prolific onshore oil and gas provinces.[2] The Osage Tribe of Oklahoma, an important producer of oil and gas in its own

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[1]Rule 17(a) of the Federal Rules of Civil Procedure, which generally requires that actions be prosecuted in the name of the real party in interest, is not contravened since the present action is brought in the name of the United States, and the United States attorney is explicitly authorized to bring such actions in all states where there are reservations or allotted Indians. See 25 U.S.C. §175.

[2]Member tribes of the Council of Energy Resource Tribes include: Acoma Pueblo, Assiniboine and Sioux Tribes of the Fort Peck Reservation, Blackfeet Tribe, Chemeheuvi Tribe, Cherokee Nation of Oklahoma, Cheyenne-Arapaho Tribes of Oklahoma, Cheyenne River Sioux Tribe, Chippewa Cree Tribe, Coeur D'Alene Tribe of Idaho, Crow Tribe, Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation, Hopi Tribe, Hualapai Tribe, Jemez Pueblo, Jicarilla Apache Tribe, Kaibab Paiute Tribe, Kalispel Tribe, Menominee Tribe, Navajo Tribe, Nez Perce Tribe, Northern Cheyenne Tribe, Northern Ute Indian Tribe, Oglala Sioux Tribe, Paiute Tribe of Utah, Pauma Band of Mission Indians, Pawnee Tribe, Penobscot Nation, Pojoaque Pueblo, Ponca Tribe of Oklahoma, Pueblo of Laguna, Pyramid Lake Paiute Tribe, Rosebud Sioux Tribe, Sac and Fox Nation, Saginaw Chippewa Indian Tribe, St. Regis Mohawk Tribe, Confederated Salish and Kootenai Tribes of the Flathead Reservation, San Juan Pueblo, Santa Ana Pueblo, Seminole Tribe of Florida, Shoshone-Bannock Tribes of the Fort Hall Reservation, Southern Ute Tribe, Spokane Tribe, Standing Rock Sioux Tribe, Three Affiliated Tribes (Mandan, Hidatsa, Arikara) of the Fort Berthold Reservation, Tule River Tribe, Turtle Mountain Band of Chippewa Indians, Confederated Tribes of the Umatilla Reservation, Ute Mountain Ute Tribe, Walker River Paiute Tribe, Wichita Tribe, Yakima Indian Nation, and Zia Pueblo.

right, has produced more crude oil than any other tribe in the nation.

Amici tribes, in turn, have literally hundreds of thousands of individual members, thousands of whom are possessed of individually allotted lands that also produce oil and gas. For many of these tribes and their members, oil and gas production represents the backbone of their ability to participate in a cash economy. As the court below has noted in another context:

> All too often in the past, unscrupulous developers have preyed on Indian tribes that lacked the technical sophistication and legal expertise to protect their rights. . . . A single tribe, backed into an impoverished corner, lacks the bargaining power to deal fairly with enormous multinational energy developers. By banding together to create their own sources of technical and legal expertise, Indian tribes can protect their resources. CERT represents an attempt to make that protection possible.

Dille v. Cert, 610 F. 2d 157, 159 (10th Cir. 1986), (*quoting* 610 F. Supp. 157) (D. Colo. 1985). Properly interpreted, the False Claims Act, as amended in 1986, 31 U.S.C. §3729, *et seq.*, represents a valuable tool in the limited arsenal available to all tribes to protect their natural resources, as well as federal appropriations that are made available to provide services to those within their jurisdictions.

This Court has long recognized both the authority and the fiduciary duty of the federal government to protect the rights of Indian tribes and individuals in their real property, including oil and gas property. Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968). In Poafpybitty, this Court expressed that authority and duty as follows: "If the Government does determine that there has been . . .

violation of a lease, *it will of course satisfy its trust obligation by filing the necessary court action."* 390 U.S. at 372 (emphasis added). Notwithstanding the confidence expressed by the Court that government officials will appropriately protect the interests of Indian oil and gas owners, history has shown that Indians themselves have often had to sue to compel the discharge of these fiduciary duties.[3]

The general failures of the government to account properly for oil and gas produced from federal and Indian lands have been exhaustively documented in recent years. In 1982, for example, the Commission on Fiscal Accountability of the Nation's Energy Resources reported to the President that, "In short, the industry is essentially on an honor system."[4] In 1983, Congress also found that "the Secretary of the Interior should aggressively carry out his trust responsibility in the administration of Indian oil and gas," and that in doing so, he shall, *inter alia*, "establish a comprehensive production accounting and auditing system ..." 30 U.S.C. §§1701(a)(4), 1711(a). Notwithstanding these findings, in 1990 the Secretary of the Interior acknowledged in a report to the President that the potential cost of failing to account for production may be as much as five hundred million dollars ($500,000,000.00),[5] and in

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[3]*See, e.g.,* Jicarilla Apache Tribe v. Continental Oil Co., et al. *[including Secretary of the Interior],* No. CIV-76-430-C (D. N.M.); Jicarilla Apache Tribe v. Supron Energy Corp., et al. *[including Secretary of the Interior],* 728 F. 2d 1555 (rehearing March 30, 1984) (rehearing *en banc*) 782 F. 2d 855 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 471 (1986).

[4]Report of the Commission on Fiscal Accountability of the Nation's Energy Resources (Linowes Commission) (Jan. 1982), at 15.

[5]The Federal Manager's Fiscal Integrity Act, Secretary's Annual Statement And Report To The President And The Congress, U.S. Department of the Interior, (December 1990), at D-13.

1991 the Director of the Minerals Management Service reported that the industry is still essentially on an honor system.[6]

The Complaint below involves allegations of a pattern of fraudulent activity by Respondents across virtually all the oil producing states in which *amici* tribes are located, and from the pleadings, Petitioner, the *qui tam* plaintiff below, has made substantial efforts to develop this case. *See* Petition at 4-6. Even if they possessed the information Petitioner has developed, Indian tribes themselves could not possibly hope to prosecute to judgment a multi-state action such as this against a colossus of the industry such as Respondents in this case.[7] The tribes could only take their information to the government and urge the government to act. If history is any guide, the government's actions, if any, would be only those

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[6]Report To The Secretary Of The Task Force On Royalty Compliance, Office of Assistant Secretary - Land and Minerals Management, Minerals Management Service, U.S. Department of the Interior (June 1991).

[7]Respondents include the largest privately held oil company in the United States, and collectively are the largest independent purchasers of crude oil in the United States and Canada, and the largest purchaser of, and payor of royalties on, crude oil produced from Indian lands. S. Rep. 101-60 (101st Cong., 1st Sess.), 105-106, 141, notes 4 and 5. By way of comparison, excluding the Osage Reservation, in 1987, Koch, Texaco, and Amoco were the three largest purchasers of crude oil from Indian lands, and of these three, Koch's royalty payments of $9.5 million were 45% of the total of these three combined. *Id.*, at 141, n.4. In 1988, Koch purchased more than 3 million barrels of crude oil from the Osage Reservation alone. *See, also,* Tiller, *The Jicarilla Apache Tribe: A History, rev. ed., 1992* (University of Nebraska, 1992), at 234. In the early 1970's that tribe spent more than $200,000 in oil and gas accounting litigation that was settled before discovery, resulting in, *inter alia*, collections of more than $1 million. The record below reveals that the *qui tam* plaintiff in this case had invested more than $750,000 in developing the case at bar as of May 1990.

compelled by action against the government.[8]

In significant respects, the issue before this Court is the same as that presented in *Poafpybitty, supra*, namely, whether the action below should be allowed to proceed. Here, as this Court observed in that case, "the Government made no attempt to intervene in the proceedings." 390 U.S. at 367. What is different in this case is that, in light of the Secretary's own admissions, we can no longer share the Court's confidence of 1968 that, if there have been violations, the government "will of course satisfy its trust obligations by filing the necessary court action." *Id.*, at 372.

Instead, we have here the candid admissions of the political branches of the government that the government cannot account for production from federal and Indian lands, and we have standing in the government's shoes a relator that has invested substantially in developing the government's case under a federal statute designed expressly to allow cases such as the one at bar to proceed in the government's absence. If this action is defeated on narrow jurisdictional grounds, there is very likely no forum in which the allegations raised in the Complaint will ever be heard.

As was also noted in *Poafpybitty*, this Court "intimate[s] no view on the merits of the case" when it allows the action to proceed. *Id.*, at 376. If the allegations raised in the Complaint cannot be proven at trial, "the suit may fail." *Id.* If, on the other hand, Petitioner should prevail, an enormous public service will have been performed, not only in terms of the government's fiduciary responsibilities to Indian tribes and allottees, but to the nation's Treasury as well. As four members of this Court have recently observed, "... a trial on the merits, whether in a civil or criminal case, is the 'main event' ..."[9]

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[8] *See* note 3, *supra*, and accompanying text.

[9] *Freytag v. Commissioner*, 111 S.Ct. 2631, 115 L.Ed.2d 764, 790 (1991) (Scalia, J., joined by O'Connor, Kennedy, Souter, JJ.,

The narrow jurisdictional question presented by this case masks fundamental issues of statutory interpretation in modern jurisprudence that have clearly divided the federal circuits, and that this Court should clarify. For the reasons set forth below, *Amici Curiae* Council of Energy Resource Tribes and the Osage Tribe of Oklahoma urge this Court to grant Petitioner's Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

1. The Tenth Circuit's Ruling is Contrary to Better Reasoned Decisions of Other Federal Circuits.

   A. *The Tenth Circuit committed the very error it sought to avoid in purporting to find the "plain language" of the statute dispositive.*

The False Claims Act provides that an action "based upon public disclosures of allegations or transactions" can be maintained by a relator only if the plaintiff qualifies as an "original source." 31 U.S.C. §3730(e)(4)(A). Whether a *qui tam* complaint is "based upon" a public disclosure is, then, an important threshold question. This Court has previously allowed to stand a decision by the Seventh Circuit that squarely supports the contention of Petitioner on that important question in this case. "[T]he Act in its present form does not allow a *qui tam* plaintiff to bring an action based *solely* on publicly disclosed transactions. Houck on Behalf of U.S. v. Folding Carton Admin., 881 F.2d 494, 504 (7th Cir.) (emphasis added), cert. denied, 494 U.S. 1026 (1989). The First, Third, and Eleventh Circuits[10] have all

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concurring) (citations omitted).

[10] United States ex rel. LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 20 (1st Cir. 1990), cert. denied, 111 S.Ct. 1312 (1991); United States ex rel.

subsequently adopted rulings that support this interpretation given to Section 3730(e)(4)(A).

The court below expressly rejected that reading of the statute, however, concluding that such an interpretation "would dramatically alter the statute's plain meaning." *U.S. ex rel. The Precision Co. v. Koch Industries*, 971 F.2d 548, 551 (10th Cir. 1992). Having declined "to insert the adverb 'solely'," the courts below then proceeded to insert into the "plain and unambiguous language" of the statute an equally modifying prepositional phrase, instead, and concluded that "a plaintiff whose *qui tam* action is based *in any part* upon publicly disclosed information is subject to the 'original source' jurisdictional requirement." *Id.*, at 551 and 553 (emphasis added).

If the statute is unambiguous, it needs no interstitial drafting such as that provided by the courts below. Conversely, if the statute does require such a statutory filler, it is not unambiguous as the court below ruled. If, on the other hand, the statute contains many ambiguities, as the Third Circuit has found,[11] then the construction adopted by the First, Third, Seventh, and Eleventh Circuits, and advanced by Petitioner here, is far more sound than that adopted by the court below.

Only the Second Circuit seems to have developed a view of this important threshold question that corresponds to that adopted by the courts below, and neither of the cases examined by that circuit bears comparison with the facts of the instant action. In the first of those, the relator conceded in deposition that he became aware of the facts upon which he sought to base his complaint in a newspaper article. *United States ex rel. Dick v. Long Island Lighting Co.*, 912

Williams v. NEC Corp., 931 F. 2d 1493, 1500 (11th Cir. 1991); *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1159-60 (3d Cir. 1991).

[11] *Stinson*, n. 10, *supra*, at 1154.

F.2d 13,15 (2d Cir. 1990). In the other case reviewed by that Circuit, *United States ex rel. John Doe, v. John Doe Corporation,* 960 F.2d 318 (2d Cir. 1992), the government moved to dismiss the action brought by an attorney who had negotiated a release of the putative claim from his own client who was already under criminal investigation. *Id.*, at 319, 323.

At this stage, this Court need only resolve the important threshold issue presented by 31 U.S.C. §3730(e)(4)(A). This case should be remanded with instructions for the lower courts to apply the same "common sense" direction this Court recently provided in *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 57 (1987) (and cases cited), in a manner consistent with the conclusions reached by the First, Third, Seventh, and Eleventh Circuits.

B. *The Tenth Circuit erred in interpreting the statute in a way that renders related provisions meaningless.*

Quoting Chief Justice Taney in *United States v Heirs of Boisdore'*, 8 How. 113, 122, 49 U.S. 113 (1850), this Court, in a unanimous opinion, recently observed that, "On numerous occasions we have noted that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Pilot Life Insurance Co. v Dedeaux,* 481 U.S. 41, 51 (1987) *(citations omitted).* This principle was forcefully reaffirmed as recently as 1990. "In determining the meaning of a statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon, et al. v. United States,* 494 U.S. 152, 158 (1990).

In closely related provisions of the very section of the statute here involved, it is expressly provided that, with

the permission of the court and for good cause shown, the government may intervene at a later date in an action brought by a *qui tam* plaintiff. 31 U.S.C. §3730(c)(3). Subsection (d)(1), in turn, expressly limits the recovery a plaintiff-relator may claim if the government does intervene and the court finds the action "to be based *primarily* on disclosures of specific information (other than information provided by the person bringing the action) ..., taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation." 31 U.S.C. §3730(d)(1) (emphasis added), (parentheses in original). Section 3730 of the False Claims Act, as amended in 1986, thus clearly contemplates that some actions brought by *qui tam* plaintiffs will be based "primarily" on publicly disclosed information, and that such information may well be other than that provided by the person bringing the action.

The district court below found Section 3730(d)(1) to be irrelevant because it deals only with actions in which the government elects to proceed. Petition, at 28. The Tenth Circuit apparently found it unnecessary even to consider this issue raised on appeal because it found Section 3730(e)(4)(A) to be such "a quick trigger" that further analysis in the context of preceding provisions and of the statute as a whole was unnecessary. Koch, *supra*, at 552. In fact, under the reasoning adopted by the courts below, there will never be "a later date" at which the government might choose to intervene in this case, nor an opportunity for the court to take into consideration the significance of the information and the role of the person advancing the case to litigation. Such reasoning completely ignores the counsel of this Court in Crandon and its predecessors dating back to 1849. "It is an ancient and sound rule of construction that each word in a statute should, if possible, be given effect. An interpretation that needlessly renders some words superfluous is suspect." Crandon, *supra.*, at 171 (Scalia, J., concurring).

C. *The Tenth Circuit's ruling that corporate plaintiff does not have direct and independent knowledge is inconsistent with rulings of other federal circuits and the larger federal corpus juris.*

The Tenth Circuit acknowledges that 31 U.S.C. §3730(e)(4)(B) is not implicated at all if plaintiff's complaint is not, in fact, "based upon" a public disclosure. Koch, *supra,* at 552, n.2. Having (improperly, *amici* contend) reached that question, however, the Tenth Circuit found it notable that Petitioner, The Precision Company, is the plaintiff (not its sole founders and shareholders), and concluded that the corporate plaintiff does not possess the "direct and independent knowledge" required to proceed. Koch, *supra*, at 554.

This Court, on the other hand, has allowed to stand a ruling by the First Circuit that an employee whose job it is to uncover fraud cannot qualify as an original source precisely because "the fruits of his labor belong to his employer." U.S. ex rel. LeBlanc v. Raytheon, 913 F.2d 17, 20 (1st Cir. 1990), cert. denied, 111 S. Ct. 1312 (1991). Likewise, the Third Circuit saw no difficulty in permitting a law firm to seek to qualify as a proper *qui tam* plaintiff. Stinson, *supra,* at 1150-51 (action dismissed on other grounds).

More importantly, however, for nearly one hundred forty years, this Court has held that a corporation is a "person" for purposes of federal jurisprudence. Mr. Chief Justice Marshall's opinion for this Court to the contrary in Bank of U.S. v. Deveaux, 5 Cranch 61, 9 U.S. 61 (1809) survived only thirty-five years, and was overturned by a unanimous Court, reciting that Marshall himself had been unhappy with his own decision in Deveaux. "[A] corporation ... is to be deemed to all intents and purposes as

a person, although an artificial person, ... as much as a natural person." *Louisville, Cincinnati and Charleston R.R. Co. v. Letson,* 2 How. 497, 554-59, 43 U.S. 497 (1844). This rule has not changed since *Letson* was announced, and has recently been forcefully reaffirmed by this Court. "A corporation is the paradigmatic artificial 'person'..." *Carden v. Arkoma Associates,* 110 S. Ct. 1015, 1017 (1990).[12] The Tenth Circuit's ruling below cannot be squared with this long-standing principle of federal jurisprudence.

The Tenth Circuit's opinion readily acknowledges that substantial identity exists between the allegations in the instant case and those made in earlier litigation brought by Petitioner's principal shareholder, and also notes substantial identity between the allegations raised before the Senate committee and those contained in the present proceeding. *Koch, supra*, at 553-54. Notwithstanding that the record is undisputed, and that Respondents concede that Petitioner's sole shareholders provided the Senate Committee with much of their information, the Tenth Circuit concluded that the closely held corporation cannot qualify as an original source of the information that was provided to the government by its sole shareholders and founders. See Petition, at 8.

2. The Tenth Circuit's Ruling is Contrary to Applicable Doctrines of Statutory Interpretation

A. *The Tenth Circuit erred in invoking inapposite considerations of federalism in a case involving fraud against the United States.*

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[12]The sharp dissent in *Carden* did not take issue with the Court's observation that this rule will not be disturbed, but, rather, disagreed with the majority's refusal to extend similar treatment to other artificial entities in appropriate circumstances. *Carden, supra,* at 1022-28 (O'Connor, J., *dissenting*).

The Tenth Circuit's analysis below proceeded from an assumption that "Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent a showing of proof by the party asserting jurisdiction." Koch, *supra.*, at 551 *(citation omitted)*. Accordingly, the court below reasoned, "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." *Id.*, at 552 *(citation omitted)*.

From this analytical framework, the court below found that "To insert the term 'solely' into §3730(e)(4)(A) would impermissibly expand federal jurisdiction ..." *Id.* From there, it was a short step for the court to insert, instead, the prepositional phrase "in any part" into the statute in order to achieve the predetermined result of resolving any doubts "against federal jurisdiction."

This analytical framework is misplaced in interpreting a statute involving a fraud against the United States in connection with the payment of royalties due on oil and gas produced from federal and Indian lands. The authorities cited by the Tenth Circuit below stem from well-founded principles of federalism and have been invoked by the courts regularly to defeat attempts to invoke the federal courts to resolve disputes that properly belong in the courts of the various states. Thus, statutes conferring federal jurisdiction on the basis of diversity of citizenship and amounts in controversy have been strictly construed. *Penteco Corp. v. Union Gas System*, 929 F.2d 1519 (10th Cir. 1991); *Carden v. Arkoma Associates.*, 494 U.S. 185 (1990); *Glover v. Johns-Manville Corp.*, 662 F.2d 225 (4th Cir. 1981). These cases involve considerations that go to the very fabric of our Republic and present federal courts with the issue of proceeding at all only in derogation of the sovereignty of the various states. Those considerations have no place in this case, which involves only considerations of federal law.

In the diversity cases cited by the Tenth Circuit, the

litigants could repair to the courts of the states. In the instant case, if Petitioner is not allowed to proceed in the name of the government, the federal government's and *amici* Indian tribes' interests will have no forum at all, precisely the circumstances that should mandate the unflagging exercise of federal jurisdiction where it does exist.

The Tenth Circuit, alone among the seven federal circuits that have reviewed the False Claims Act Amendments of 1986, has adverted to a doctrine applicable to principles of federalism in order to defeat federal jurisdiction in a case involving fraud against wards of the federal government and against the government itself, and has done so in a case involving a statute which was enacted in order to encourage private citizens to prosecute cases of fraud against the federal government in the federal courts.

"The duties of [the federal courts] to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation." *Carden, supra,* 110 S.Ct. 1015, at 1023 (1990) (O'Connor, J., dissenting), (quoting Marshall, Ch. J., in *U.S. Bank v. Deveaux,* 5 Cranch 61, 87, 9 U.S. 61 (1809) (*rev'd on other grounds*), *Letson, supra*.

B. *The Tenth Circuit did not properly consider the claims of Indian tribes and individuals represented by the Complaint.*

The courts below were correct, of course, in recognizing that federal courts are courts of limited jurisdiction. Where, as here, however, it was well pleaded[13] that the jurisdiction of the federal courts is being invoked not only to protect the federal Treasury from fraud, but also to carry out the federal government's fiduciary duty to

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[13] *See* Complaint, ¶¶ 23, at 6; 25, at 7; 45, at 14; 49, at 16.

protect its Indian wards from that same fraud, the courts below should have realized that their construction of the jurisdictional statute was at odds with another principle that is equally rooted in the nation's federal jurisprudence:

> "When we are faced with these two possible constructions, our choice between them must be rooted in this Court's Indian jurisprudence: 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' *Montana v. Blackfeet Tribe of Indians*, 471 U.S., at 766, 105 S. Ct., at 2403. See also *McClanahan v. Arizona Tax Commission*, 411 U.S., at 174, 94 S. Ct., at 1263."

County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 693 (1992).

Where a relator stands in the shoes of the federal government to protect the interests of Indian oil and gas owners to whom the nation owes a fiduciary duty, as well as to protect the national Treasury, the courts below should have taken into consideration the doctrines of statutory interpretation applicable to federal-Indian law. If Petitioner proceeds in the name of the government, or if the government intervenes, Indian tribes and individuals may well find themselves bound by application of the doctrine of *res judicata*. *See, Nevada v. U.S.*, 463 U.S. 110, 129-45 (1983); *Arizona v. California*, 460 U.S. 605, 626-29 (1983); *Heckman v. U.S.*, 224 U.S. 413, 443-46 (1912). If Indians' interests can be determined by this litigation, their relator representing those interests should be accorded the same presumptions that the government or the tribes themselves would receive if they were in court. The lower courts are in need of this direction, and it can only come from this Court.

PUBLIC POLICY REASONS FOR GRANTING THE PETITION

1. The Federal Circuits are Clearly in Need of This Court's Guidance for Development of a Consistent Body of Law in the Judicial Administration of the False Claims Act.

This Court has steered well clear of the jurisdictional requirements of the *qui tam* provisions of the False Claims Act Amendments of 1986, and has allowed the law to develop in the various circuits. Unfortunately, the law is developing in no particular direction or pattern. The seven federal circuits that have wrestled with the two jurisdictional bars at issue here, 31 U.S.C. §§ 3730(e)(4)(A) and (B), have developed no consistent body of case law. Plaintiffs who have unsuccessfully assaulted these barriers in one circuit almost certainly would have been successful in other circuits.[14] More disturbingly, plaintiffs who successfully survived challenges under these provisions in

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[14]Compare, e.g., *United States ex rel. Williams v. NEC*, 931 F.2d 1493, 1500 (11th Cir. 1991) with *United States ex re. LeBlanc v. Raytheon Company*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 1312 (1991).

some circuits almost certainly would have found themselves out of court in other circuits.[15] The lower federal courts have wrestled valiantly with the meaning of such terms as "based upon",[16] "public",[17] "disclosure",[18] "public disclosure",[19] "hearing",[20] "information",[21] "original source",[22] "direct",[23] "independent",[24] and "direct and independent",[25] as they are used in this statute. The "practical considerations of judicial economy" the Tenth Circuit sought to serve are certainly not advanced by this method of jurisprudence. See *Koch*, *supra* at 553. If the law should not depend on what the judge had for breakfast, neither should the law of the land be dependent upon

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[15] Compare, e.g., *United States ex rel. Hagood v. Sonoma County Water Works*, 929 F.2d 1416 (9th Cir. 1991), with *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991).

[16] *United States ex rel. LaValley v. First Nat. Bank of Boston*, 707 F. Supp. 1351, 1366 (D. Mass. 1988); *Houck*, *supra*, at 504; *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2nd Cir. 1990); *United States ex rel. The Precision Co. v. Koch Industries*, 971 F.2d 548, 552-54 (10th Cir. 1992).

[17] *United States ex rel John Doe v. John Doe Corporation*, 960 F.2d 318, 322 (2nd Cir. 1992); *United States ex rel. Hagood v. Sonoma County Water Works*, 929 F.2d 1416, 1419 (9th Cir. 1991).

[18] *LaValley*, *supra*, n.15, at 1366; *United States ex rel. Hagood v. Sonoma County Water Works*, 929 F. 2d 1416, 1419 (9th Cir. 1991).

[19] *Stinson*, *supra*, at 1157-1160; *Williams*, *supra*, at 1499-1500.

[20] *Stinson*, *supra*, at 1155; *LaValley*, *supra*, at 1366.

[21] *Dick*, *supra*, at 16.

[22] *Stinson*, *supra*, at 1160.

[23] *Stinson*, *supra*, at 1160-1161.

[24] *Stinson*, *supra*, at 1159-1160; *LeBlanc*, *supra*, at 20.

[25] *Stinson*, *supra*, at 1159-1160; *LeBlanc*, *supra*, at 17.

longitude and latitude.

2. The Ruling Below Penalizes Cooperation with the Political Branches of the Government.

Amici Indian tribes cooperate routinely and willingly with many arms and agencies of the government. They confer regularly with members and committees of Congress, respond to inquiries from Inspectors General from many Executive Departments, cooperate with the Comptroller General and General Accounting Office, and respond to inquiries from other government agents and officials. The ruling of the Tenth Circuit effectively starts the clock on precipitous races to the courthouse with each instance of such cooperation.

Petitioner here developed its case much as the prosecutorial arm of the Executive Branch would have: locating and interviewing witnesses, commissioning surveillances, and developing the case methodically to include admissions against interest from more than one hundred potential witnesses. When importuned by a duly sanctioned investigating arm of the Legislative Branch, Petitioner cooperated fully. And for this cooperation with duly constituted authorities of the political branches, the Tenth Circuit has stripped Petitioner of its ability to fulfill the purpose of the very law at issue. The impetus for future *qui tam* plaintiffs to refuse to cooperate, or to file first and cooperate later, is obvious. A statutory interpretation that produces such a result should not be allowed to stand if another interpretation is readily available.

3. The Ruling Below Defeats the Purpose of the False Claims Act.

The Tenth Circuit's ruling that only a qualifying "original source" may bring any *qui tam* action that is *in any part supported by* a previous disclosure of the allegations

effectively strips the False Claims Act from the arsenal available to Indian tribes to protect either their own resources or the increasingly scarce federal appropriations available to them for construction of housing, roads, hospitals, schools, education, or for the delivery of welfare services. *Koch, supra,* at 552 (emphasis added). Respondents concede, and the courts below acknowledge, that the founders and sole shareholders of corporate plaintiff herein contributed significantly to the disclosure of the fraud. *Qui facit per alium facit per se.*

CONCLUSION

The question presented is whether or not Petitioner shall be allowed to present its evidence. In deciding this question, the Tenth Circuit should have been led by analysis, and not driven by inapposite assumptions. "The purpose of Congress is the ultimate touchstone," for the beginning of that analysis. *Pilot Life, supra,* 481 U.S. at 45 (1987) quoting *Allis Chalmers Corp. v. Lueck,* 471 U.S. 202, 208 (1985), quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103 (1963). The Tenth Circuit below correctly noted that the False Claims Act, as amended in 1986, has two basic goals:

> "1) to encourage private citizens with first-hand knowledge to expose fraud; and 2) to avoid civil actions by opportunists attempting to capitalize on public information without *seriously contributing* to the disclosure of the fraud."

(emphasis added). This acknowledged purpose of Congress is thwarted by the ruling of the Tenth Circuit below. *Amici* Indian tribes respectfully request this Court to grant the

Petition; to remand the case with instructions that provide the lower federal courts with the guidance so clearly necessary for the development of a consistent body of law in the judicial administration of the False Claims Act; and to allow the evidence that has been developed in this case to see the light of day.

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January 26, 1992

Supreme Court, U.S.
FILED
FEB 3 1993
OFFICE OF THE CLERK

No. 92-927

In The
Supreme Court of the United States
October Term, 1992

United States of America, ex rel.,
The Precision Company,

Petitioner,

v.

Koch Industries, Inc., et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioner's Reply to
Respondents' Brief in Opposition to
Petition for Certiorari

Introduction

The United States of America, ex rel. The Precision Company herewith submits, pursuant to Supreme Court Rule 15.6, and for the purpose of clarifying the record, the following Reply to Respondents' Brief in Opposition to Petition for Certiorari.

Petitioner Has Never Conceded That Its Action Is Based Upon Public Disclosures

Respondents' Brief in Opposition to Petition for Certiorari is based, in large part, upon the false premise that Petitioner conceded in the district court that its action is based in part upon public disclosures, and that such a finding went "uncontested" in the court of appeals. Indeed, Respondents make that assertion four times. Respondents'

Brief, at 9, 12, and 13. Respondents thus wrongly denigrate the Petition for Certiorari as nothing more than an attempt to "revisit district court factual findings that went entirely uncontested below." Id., at 13. Respondents' representations are directly contrary to the record in this case.

The Petition for Certiorari focuses upon Petitioner's claim that its action arose from and therefore is "based upon" evidence gathered during Petitioner's independent investigation of Koch Industries, Inc. Petition, at 12-13. This claim did not arise, as Respondents suggest, for the first time in this Court. Petitioner has taken the same position throughout this litigation:

1. In response to the Motion to Dismiss filed by Respondents in the district court, Petitioner argued that "Precision's complaint is in fact based on an independent, extensive and continuing investigation of defendants' fraudulent misconduct." Aplt App, Doc 4, p. 89-90;

2. In response to the objection filed by Respondents to the magistrate's Findings and Recommendations in the district court, Petitioner argued that the complaint is "not based upon publicly disclosed information." Aplt App. Doc 11, pp. 424-427;

3. In its opening brief in the court of appeals, Petitioner argued that its "independent investigation" formed the basis for its action. Appellant's Opening Brief, at 12-13; and

4. In its reply brief in the court of appeals, Petitioner devoted three pages of argument to the proposition that its action is not "based upon" prior public disclosures, but, rather, upon Petitioner's "independently gathered evidence." Appellant's Reply Brief, at 6-9.

The record clearly shows that Petitioner consistently argued that its action is not "based upon" public disclosures within the meaning of Section 3730(e)(4)(A).

The Petition for Certiorari raises important issues regarding the proper interpretation of the jurisdictional provisions of the False Claims Act, and represents the only way important claims held by a large number of Native Americans will ever be heard. Brief *Amicus Curiae*, at 4-5. Respondents' Brief in Opposition utilizes gross mischaracterizations of the record in an attempt to deflect the Court's attention from these important issues. Having clarified these mischaracterizations, Petitioner respectfully requests that this Court grant the Petition, and that the Court provide the lower courts with the guidance they need to properly interpret 31 U.S.C. §3730(e)(4)(A) and (B).

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